

Minnesota Practice Series

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# Jury Instruction Guides—Criminal

Minnesota  
District Judges  
Association

Stephen E. Forestell

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# MINNESOTA PRACTICE SERIES™

Volume 10

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## MINNESOTA JURY INSTRUCTION GUIDES

Sixth Edition

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### CRIMINAL [CRIMJIG]

Chapters 1—16

Prepared by the

MINNESOTA DISTRICT JUDGES ASSOCIATION  
COMMITTEE ON CRIMINAL JURY  
INSTRUCTION GUIDES

STEPHEN E. FORESTELL

Reporter



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# 2015-2016 INTRODUCTION TO THE SIXTH EDITION

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The Sixth Edition of the Criminal Jury Instruction Guide continues thirty-eight years of judicial review of laws and cases by the Minnesota District Judge Association Criminal Jury Instruction Guide Committee to aid judges and attorneys in the preparation of jury instructions. Proper use of the instructions requires judges and attorneys to pay attention not only to what the instruction itself says but also to the footnotes and Comments to avoid the various pitfalls and limitations that may apply to a particular instruction. Many instructions, especially those including a predicate offense, such as burglary, require a careful attention to footnotes and Comments so that a legally accurate jury instruction can be drafted.

The Committee has taken the opportunity posed by a new edition to experiment with variations in the form of the jury instructions, most notably Chapter 11 – Homicide, and Chapter 13 – Assaults. Many of the questions that formed interrogatories in the past edition have been incorporated as elements in the offenses, unless the legislature has indicated that certain parts of the offense (generally the level of harm or the value of property) go to sentencing rather than to the commission of the offense. Other sentence-enhancing provisions, including possession of a dangerous weapon or firearm, have been moved to Chapter 8, now titled Sentencing Proceedings.

New or improved instructions are now available murder or assault of a prosecuting attorney or judge; non-support of a child or spouse; perjury; RICO; sale of tobacco and tobacco-related items to minors; lawful gambling fraud; and many of the drug offenses. The definitions of “causation” and “possession,” including constructive possession have been assigned their own CRIMJIGs, although they have been incorporated to the greatest extent possible in the jury instructions in which they apply. The CRIMJIG which defined force and coercion, on the other hand, has now been incorporated throughout Chapter 12, Sex Crimes.

There is also new commentary on criminal sexual conduct by clergy members based upon the *Wenthe* and *Bussman* cases; burglary of an apartment building; and clarifying the effect of the



*Royston* on being in possession of a dangerous weapon or firearm. On-going developments in instructing on circumstantial evidence has also been included.

At the same time, the Committee has made substantial effort to see that the instructions parallel the statutes as closely as possible, that statutory and case citations are correct, and that useful commentary has been added, while extraneous and irrelevant commentary has been removed.

The Committee has taken the opportunity posed by a new edition to experiment with variations in the form of the jury instructions, most notably Chapter 11 – Homicide, and Chapter 12 – Assault. Many of the questions that formed interrogatories in the past edition have been incorporated as elements in the offense, unless the legislature has indicated that certain parts of the offense (generally the level of harm or the value of property) go to sentencing rather than to the commission of the offense. Other sentences containing provisions, including possession of a dangerous weapon or firearm, have been moved to Chapter 8, now titled Sentencing Provisions.

New or improved instructions are now available for murder or assault of a prosecuting attorney or judge; non-support of a child or spouse; perjury; RICO; sale of tobacco and tobacco-related items to minors; habitual criminal; and many of the drug offenses. The definitions of "custody" and "possession" included in constructive possession have been assigned their own CHMIGs, although they have been incorporated in the greatest extent possible in the jury instructions in which they apply. The CHMIG which defined force and coercion, on the other hand, has now been incorporated throughout Chapter 12, Sentencing.

There is also new commentary on criminal sexual conduct by clergy members based upon the Wehrle and Huppert cases; the effect of an apartment building; and clarifying the effect of the

# ACKNOWLEDGEMENTS

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The Committee would like to thank Judge Stephen Halsey for his contributions on the instructions on the use of social media, Judge Nicole Engisch for her contributions on the instructions for self-defense, and Judge Hilary Caligiuri for her contributions on the instructions for drug offenses.

The Committee gratefully acknowledges the invaluable work and contributions of their law clerks: Jamie Bergerson, Elizabeth M. Cadem, Samuel M. Johnson, Baylea Kannmacher, James E. Morrison, Rebecca Peterson, Bob Putnam, and Daniel S. Shub.

The Committee also wishes to thank Stephen E. Forestell for his continuing hard work and dedication in preparing this edition of the Criminal Jury Instruction Guide.

COMMITTEE ON CRIMINAL JURY INSTRUCTION GUIDES  
MINNESOTA DISTRICT JUDGES ASSOCIATION

St. Paul, Minnesota  
May, 2015





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# EXPLANATORY NOTE

**Scope and Organization of Instructions.** The instructions in this publication are divided into two parts. Chapters 1 through 8 comprise the General Part; Chapters 11 through 33 cover Specific Crimes. The General Part is divided into two sections. The first of these, including Chapters 1 through 3, contains instructions designed to be given the jury before and after trial in most criminal cases. The second section of the General Part, including Chapters 4 through 8, covers general principles of the criminal law, such as liability for crimes of another, attempts, conspiracy, defenses and consideration of elements that might result in an enhanced sentence following the determination of guilt. The Specific Crimes in Part II include most offenses under the laws of Minnesota that the Committee believes are likely to be submitted to a jury for trial.

**Forms of Instructions for Specific Crimes.** For a specific crime, two instructions are provided. The first defines the crime; the second sets forth its elements. In the Comments, these two are frequently referred to respectively as the “Defined” Instruction and the “Elements” Instruction. The “Defined” Instruction has been kept as short as possible, and generally follows the statutory language to the extent that the words and ideas in the statute are familiar to lay persons. The “Elements” Instruction breaks each crime down into its essential elements, which are numbered so that the jury may more easily remember or refer to them. On occasion, we have used non-statutory language when we have determined it was necessary to do so in order to help the jury better understand the elements. The trial judge should always compare the statute to the jury instruction guide to be satisfied that the choices the Committee has made accurately reflect the trial court’s interpretation of the statute. We also have tried to eliminate needlessly repetitive phrases.

Following the numbered elements, a paragraph appears that begins “If you find that each of these elements has been proven beyond a reasonable doubt,” etc. In this paragraph, the jury is told that if it finds that the elements have been proved, the defendant is guilty. It is also told what to do if it finds any element has not been proved. Generally this means that the jury must find defendant not guilty, but sometimes it means that it must consider lesser offenses. In a few cases, we have incorporated the lesser-offense charge into the charge on the main offense.



This has been done only when (as in the case of murder in the first degree) a lesser offense is almost always included, or when (as in the case of aggravated robbery) the lesser offense results from the failure to find that a single specific element of the main offense has been proved.

Although it used to be a general rule that special verdict forms were not to be used in criminal cases, that rule has now changed. Following the United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296; 124 S.Ct. 2531 (2004), it became clear to the Committee that those factors of the crime that affect the possibility of an enhanced sentence are best handled by giving them to the jury as questions on the jury form to be answered “yes” or “no”. The questions are generally framed so that the more incriminating answer is “yes”. This approach has been used before in the jury instructions, most often (as in theft) when the degree of a crime turns on the value of some property, or when it turns upon the level of harm inflicted upon a victim. The Committee, with this edition, has inserted several items as elements that used to be included in the interrogatories, based upon legislative language indicating that whether a portion of the offense is an element or a sentencing consideration.

In the individual instructions there are many instances in which we have used blanks, parentheses, brackets, and alternative paragraphs. In most instances, we believe that the significance or meaning of these devices is clear; when it is not, we have sought to explain them in a footnote. As a general rule, parentheses indicate options for factual variations, whereas brackets indicate optional element choices, depending on the portion of the statute that has been charged.

We have also moved several formerly footnoted items directly into the instruction as they seem to be missed when jury instructions are prepared. Again, the footnotes play an important part in preparing the instructions and should be consulted.

In many cases, an element of the offense is a prior incident or conviction. In such cases, the defendant may stipulate to the prior incident or conviction and remove that element from the jury’s consideration. It is important that the stipulation (which is the waiver of a right to a jury trial on an element of the offense) is a personal waiver. The defendant’s attorney can enter a waiver on behalf of the defendant. See *State v. Kuhlman*, 806 N.W.2d 844 (Minn.2011).

**Submitting Written Instructions to the Jury.** We strongly encourage the judges to submit written instructions to the jury. Minnesota Rules of Criminal Procedure, Rule 26.03, subd. 18(4),

## EXPLANATORY NOTE

provides that “[t]he instructions may be in writing and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.” Moreover, the Minnesota Supreme Court has encouraged trial courts to give written jury instructions in most criminal cases to better ensure fair results by juries unversed in the law. See *State v. Swain*, 269 N.W.2d 707, 715-16 (Minn.1978).<sup>1</sup> Such a practice can eliminate the difficulties that a jury has in absorbing, comprehending, and applying legal principles. A single oral presentation can be inadequate to inform a jury about areas with which they are generally unfamiliar. By making the jury instructions readily available during deliberations, the court ensures that the jury need not disrupt their discussions at crucial times to reassemble in the courtroom for another reading of the disputed or forgotten instructions.

Before written instructions are submitted to the jury, both counsel and the court should scrupulously examine the jury’s copy to ensure that it is correct. The copy should bear no markings that would identify which party requested any specific instruction or underlinings that might cause a jury to give undue weight and force to particular words. Submitting multiple copies will make it even easier for the jury to discuss the instructions.

**Venue.** In each “Elements” Instruction, the following element appears: “\* \* \*, (some element of the offense) (defendant’s act) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.” This is in accordance with Article I, Section 6, of the Minnesota Constitution (“...the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed...”) and M.S.A. § 627.01. In *State v. Krejci*, 441 N.W.2d 510 (Minn. Ct. App.1989), the Court held that M.S.A. § 627.15, which allows prosecution of a case of child abuse to be venued wherever the child was “found,” was a violation of Article I, Section 6 of the Minnesota Constitution if applied to a case in which defendant did not commit at least one element of the offense in the same judicial district. With the advance of electronic communications, venue in stalking cases has particularly focused upon the one element requirement, including where a communication is made or received, or where the defendant or victim resides.

**Comments.** In preparing these instructions, our task has been, in one important respect, very different from that of our

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<sup>1</sup> In *Swain*, the Court advised that whenever either party so requests, all instructions should be submitted in writing to the jury in order to avoid placing undue influence on any particular instruction. *State v. Swain*, 269 N.W.2d 707, 716 n. 13 (Minn.1978).



## MINNESOTA JURY INSTRUCTION GUIDES

colleagues who prepared the civil instructions. The proportion of statutory law to judicially pronounced law is almost the opposite in the criminal law as it is in civil law. Indeed, we have found many sections of the criminal statutes that have never been interpreted by the Minnesota appellate courts. It has been necessary for us to interpret ambiguous passages, and to reconcile some seemingly direct contradictions. We have sought in the Comments to point out these problems when we have found them, and to state why we have resolved them as we have. The Comments cite the important decisions that have interpreted our statutes or these instructions, but we have not tried to prepare a treatise on the criminal law. The cases are cited only when we believe they cast light on the specific problem of instructing the jury.

COMMITTEE ON CRIMINAL JURY  
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# **PART I. THE GENERAL PART**

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## **A. GENERAL INSTRUCTIONS TO THE JURY**

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### **CHAPTER 1**

## **INSTRUCTIONS TO THE JURY BEFORE TRIAL**

---

### *Table of Instructions*

#### **Introduction**

#### **CRIMJIG**

- 1.01 Instructions to the Jury Panel before Empanelment
  - 1.02 Instructions to the Jury before Trial Begins
- 

#### **Introduction**

The principal purpose of Jury Instructions 1.01–1.02 is to put the jurors at ease by explaining what is going to happen. The instructions help to save time by making individual explanations during voir dire unnecessary and perhaps triggering a ground of challenge before any further time is taken. These purposes do not lend themselves to standard instructions. Each judge will probably find jurors respond best to a statement about the process and the case that is phrased as naturally as possible by the judge. As an aid to forming such a statement and as a summary of points that should be covered, suggested forms for these instructions are given.

CRIMJIG 1.01 guides the judge through the voir dire process to a great extent. It was drafted, in part, as a response to the 2001 Supreme Court Jury Task Force Recommendations. CRIMJIG 1.02 is drawn from the plain-language version developed by the Minnesota District Judges Association Civil Jury Instruction Committee in 1999 and is designed to meet, in part, the recommendation by the 2001 Supreme Court Jury Task Force to extend plain-language to the criminal jury instructions.

**CRIMJIG 1.01**

**INSTRUCTIONS TO THE JURY PANEL BEFORE  
EMPANELMENT**

You have been summoned to the District Court of \_\_\_\_\_ County today for the purpose of selecting a jury to try a criminal case. My name is Judge \_\_\_\_\_.

It is important that you be able to see what is happening here and to be able to hear the questions being asked. If any of you have difficulty hearing or understanding, please let me know now so that we can make arrangements to help you. Does anyone have difficulty hearing or seeing and need any assistance? Does anyone have any trouble understanding what I am saying?

[Panel sworn and seated]

Again, this is a criminal case. A complaint (an indictment) has been filed with this court that alleges: [The complaint or indictment may be read or summarized at the court's discretion.] The mere fact that the defendant (may have been arrested) (has been charged by (indictment) (complaint)) (or) (has been brought before the court by the ordinary process of the law) should not be viewed by you as evidence of or in any suggesting the defendant's guilt.

To this complaint (indictment) the defendant, \_\_\_\_\_, has pled not guilty. This plea denies the charges and places upon the State of Minnesota the burden of providing the defendant's guilt beyond a reasonable doubt.

The State is represented by \_\_\_\_\_. Please rise, \_\_\_\_\_. The defendant is represented by \_\_\_\_\_. Please rise, \_\_\_\_\_. Would the defendant please rise?

Some general rules of law apply in a criminal case. I will give you those rules now. In the questioning that will take places in a few minutes, you may be asked whether you will accept and follow those rules of law, and you should have these instructions in mind when you answer those questions.



The defendant is presumed innocent. In order for you to find the defendant guilty, the State must prove guilt. The defendant does not have to call witnesses, introduce evidence, ask questions, or otherwise prove (his) (her) innocence. The presumption of innocence remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt by evidence admitted in this trial.

To ensure both the defendant and the State receive a fair trial by an impartial jury, it will be necessary for me and for the counsel for each party to ask you certain questions that you must answer under oath. Please do not take offense at any question you are asked. Your contribution to this important and serious matter is best assured by your honest answers to those questions. Some of you who are called to be questioned will be excused from serving on the jury. If you are excused, it does not mean that anyone doubts that you are a fair person.

We will now begin the juror selection process.

[Names of appropriate number of prospective jurors are selected according whatever procedure is followed.]

[When your name is called, please come forward and take your seat as directed. If your name is mispronounced, we apologize and ask that you state the correct pronunciation as you come forward.]

Your contribution to the important and serious matter at hand is best assured by your full and free answers to the questions asked during the jury selection process. It is critical that your answers be honest and truthful.

I will ask you questions about your qualifications to sit as jurors in this case. When I am done, the attorneys will ask additional questions. I hope that you will not take offense at any question you may be asked. Some of you will be excused from serving on this jury. If you are excused, it does not mean that anyone doubts that you are a fair person.

Those of you not yet called are asked to listen closely to all the proceedings until a jury is finally empanelled. This is because



you might be called upon to replace a potential juror who has been excused. It will save time if we do not have to repeat all the questions and you are prepared to offer your answers.

If your answer to any of the questions is "yes," please raise your hand. If you would have difficulty responding to a particular question or if your answer to any question by me or the attorneys would be personal or sensitive or have an adverse effect upon another juror, please let me know before answering and you can answer outside the presence of the other jurors.<sup>1</sup>

In answering questions, be as candid and truthful as possible. We are not trying to pry unnecessarily into your personal lives. We are merely seeking information to select a fair and impartial jury. We all have attitudes, beliefs, and life experiences that may be important.

1. Would anyone have difficulty accepting or following the rules of law that:
  - a. The defendant is presumed to be innocent.
  - b. The state has the burden of proof.
  - c. The state must prove [the] [each] charge beyond a reasonable doubt.
  - d. The defendant does not have to prove (his) (her) innocence.
2. Do any of you know any of the following people who may be called to testify in this case or whose names may be mentioned<sup>2</sup> in this case? Please listen carefully. Please let me know by raising your hand whether you know any of

**1.01**

<sup>1</sup>Any private answers must be given in front of the defendant and on the record. Minn. R. Crim. P. 26.02, subd. 4(1); *State v. Jurek*, 376 N.W.2d 233 (Minn. App. 1986); see also *State v. Benedict*, 397 N.W.2d 337 (Minn. 1986). Exclusion of the public requires specific findings of the reasons for

exclusion. See *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984) (presumption that jury selection shall be open to the public).

<sup>2</sup>This may include interpreters, victim advocates, spouses and family members and stand-by counsel. You may identify stand-by counsel by

these people or are related to them. [We may then ask you further questions about your knowledge or relationship.]  
The names are:

[Court reads list]

3. Do any of you know any of the parties I have introduced, including the prosecuting attorney, the defendant, the defense attorney, or any of the names I have just read to you?
4. Do any of you know any of the other jurors who are here today?
5. Are any of you presently involved in any matter where the (County) (City) Attorney's office is also involved? Have any of you been so involved in the past? Do any of you have an ongoing relationship with that office?
6. Have any of you heard or read anything regarding the alleged incident that is the subject matter of this trial? Are you familiar with the location of the (alleged) incident(s)?

This trial is expected to last \_\_\_\_ days. Normally, the trial will begin at \_\_\_\_ in the morning and continue until \_\_\_\_\_. We will then recess for lunch and reconvene the trial at \_\_\_\_\_. We will recess for the day at \_\_\_\_\_. There will be a \_\_\_\_ minute mid-morning and mid-afternoon break.

7. Does anyone:

- a. Have any physical problem that would prevent or make difficult service as a juror here today?
- b. Have a pressing personal or business concern that would make it hard to give this case your full attention?

8. I will now ask some questions concerning you, your family, and anyone close to you. I remind you that if you would

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name, but not as stand-by counsel.

prefer to answer a particular question out of the presence of the other jurors,<sup>3</sup> let me know by raising your hand.

- a. Have you, a member of your family, or anyone close to you ever testified in any court case?
- b. Have you, a member of your family, or anyone close to you ever been accused of a crime (other than a minor non-alcohol related traffic violation, that is parking or traffic tickets)? A DWI is not a minor traffic violation.
- c. Have you, a member of your family, or anyone close to you ever been the victim of or witness to a crime?

If yes, who, when, where, type of crime, arrest, disposition, satisfied?

- 9. Have you ever served on a jury or a grand jury before?
  - a. When and where?
  - b. What type of case?
  - c. Did you reach a verdict? [Do not allow attorneys to ask what the verdict was.]
- 10. Are you related to, close to, or acquainted with anyone who works in the field of criminal justice or law enforcement, such as a police officer, attorney, correctional officer, probation officer, judge, investigator, or similar occupation?
- 11. Have you ever received law enforcement training, including training in the military?
- 12. Have you ever had experience as a law enforcement officer?

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<sup>3</sup>See footnote 1.



13. Do you feel that you should automatically accept or reject the testimony of a police officer just because they are a police officer?
14. Is there anything about the nature of the charge(s) in this case which causes you to have some doubt as to whether you could give both sides a fair and impartial trial?
- [15. Optional: Photos and videos. Because of the nature of the charges you may be asked to view photographs or videos that are of a graphic nature, such as autopsy or crime scene photos or videos; would anyone have difficulty viewing such photos or videos?]
18. Do you understand that, if selected as a juror, each of you must decide this case solely on the evidence produced in court and the law as I give it to you, and not on the basis of bias, passion, prejudice, or sympathy?
19. Do you understand that you must follow the law as I give it to you, even though you think the law is, or should be, different?
- [20. Optional. At this point the Court may ask any questions the attorneys have specifically requested the Court to ask, usually those of a sensitive nature that the attorneys would rather not ask.]

Members of the jury panel, I now ask each of you to take a moment and search your mind and conscience to see if there is any reason that you cannot be fair and impartial in this case.

After giving the matter some thought, are there any of you who, for whatever reason, feel that you cannot be fair and impartial in this case?

The court has no further questions; I will now turn the questioning over to the attorneys.

Members of the jury panel, as I indicated earlier, each attorney will now have an opportunity to ask you additional questions and to follow up on the answers give to my general

questions. Please remember that the purpose of their questions is not to pry into your personal affairs but to determine your appropriateness as jurors in this particular case. The attorneys have been instructed not to repeat the questions I have already asked you.

[Defense counsel proceeds.]

[State proceeds.]

Members of the jury panel, at this point in the proceedings we have determined that you are all qualified to serve as jurors on this case. The attorneys are now selecting the people who will actually hear the case. You should understand that this is a process established by law and that any of you who are excused or struck as jurors should not feel slighted or offended.

[Defense and State exercise peremptory challenges and strike jurors from list.]

Members of the jury panel, the names of those of you who have been selected to sit as jurors in this case will now be read.

[Names are read.]

Those of you who have not been chosen are excused at this time. Thank you for your time and attention. You may retrieve your belongings and leave the courthouse. The Court Administrator will call you if and when you need to return. Now, please return to the jury assembly room.

[Court waits for excused jurors to leave.]

Members of the jury panel, you have been selected to serve on this jury. As I indicated earlier, normally the trial will begin promptly at \_\_\_\_ a.m. in the morning and continue until \_\_\_\_\_. We will then recess for lunch and reconvene the trial at \_\_\_\_p.m. We will recess for the day at \_\_\_\_\_. There will be a \_\_\_\_ minute mid-morning and mid-afternoon break.

[N.B. As a practical matter, jury should not be sworn immediately following empanelment if the trial is not to com-

mence until the following day. This allows the court the freedom to add a panel member if something unforeseen should arise with an empanelled juror after empanelment but before trial commences.]

[Swear jury]

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#### COMMENT

The Court of Appeals in *State v. Ritter*, 719 N.W.2d 216 (Minn. App. 2006) held that where the only witnesses for the state were law enforcement personnel, defendant's constitutional right to an impartial jury was violated when the district court prohibited him from asking prospective jurors during voir dire whether they were inclined to give more credence to the testimony of law enforcement; a limitation on discovery of possible bias toward law enforcement went to the very heart of the jurors' ability to impartially weigh the evidence presented, and it was impossible to determine whether actual prejudice occurred. Note that CRIMJIG 1.01, Question 13 raises the issue of credence without framing it as a "more credence" or "more believable" question.

See also *State v. Logan*, 535 N.W.2d 320, 324 (Minn.1995), holding that where the district court denied the defendant's motion to strike for cause a juror who stated during voir dire that he was inclined to give greater credence to police officer testimony than to lay witness testimony. The prospective juror did not state unequivocally that he or she would follow the trial court's instructions and fairly evaluate the evidence. On that record, the Supreme Court held a bias in favor of the police to be a sufficient basis for striking a juror for cause under Minn. R.Crim. P. 26.02, subd. 5.



**CRIMJIG 1.02**

**INSTRUCTIONS TO THE JURY BEFORE TRIAL  
BEGINS**

**Members of the jury:**

**This trial is about to begin. You have now been sworn in.**

**It is important that you, members of the jury, be able to hear and see everything that takes place during the trial. If you have any difficulty hearing or understanding what a witness is saying, or if a witness or an attorney should block your view, raise your hand immediately so that we can correct the problem.**

**Here are some basic rules about your job as a juror.**

**Your job will be to find what the facts are in this case by considering the evidence.**

**As judge, I will apply the rules of evidence and tell you what you can and cannot consider as evidence.**

**What is evidence**

- 1. Evidence is what witnesses say on the stand. This is called "testimony".**
- 2. Evidence can be items like photographs and documents. These items are called exhibits.**
- 3. Evidence can be facts that the parties agree on. This agreement is called a stipulation.**

**What is not evidence**

**The following is not evidence:**

- 1. Nothing the attorneys say during the trial, including opening statements and closing arguments, is evidence. However, listen to any statements the attorneys make. Those statements are made to help you better understand the evidence.**

2. The attorneys' questions are not evidence. The witnesses' answers are.
3. Objections are not evidence. Attorneys may object if they think a question or answer is against the rules:
  - a. I will sustain the objection if I think it is against the rules, and you should ignore this question or answer.
  - b. If I overrule the objection, the answer is evidence like the rest of the witness's testimony.
4. You cannot consider anything you hear or learn about this case outside this courtroom.

You must follow the instructions on what you can consider as evidence.

### **Taking notes**

You may take notes during the trial. You do not have to take notes.

Do not let your note taking distract you. The most important thing is to listen to the testimony as you hear it.

Your notes must stay in the courtroom during the trial.

You may take them into the jury room during deliberations.

Use your notes as an aid to your memory and not as a substitute for your memory. Fit the notes in with your total recollection of the facts.

A written note does not necessarily make a piece of evidence more important, whether you or another juror wrote it down.

### **Deciding the facts**

**Wait until you have heard all the evidence before you make up your mind.**

**Your best guide is your own good judgment, experience and common sense.**

**You must decide what testimony to believe and how much weight to give it.**

**In deciding this, you may consider the following::**

- 1. Will a witness gain or lose if this case is decided a certain way?**
- 2. What is the witness's relationship to the parties?**
- 3. How did a witness learn the facts? How did he or she know, remember, and tell the facts?**
- 4. What was his or her manner?**
- 5. What was his or her age and experience?**
- 6. Did the witness seem honest and sincere?**
- 7. Was the witness frank and direct?**
- 8. Is the testimony reasonable compared with other evidence?**
- 9. Are there any other factors that bear on believability and weight?**

### **Duty of the jury**

**You must decide the facts.**

**You and only you can decide the facts. Do not take anything I say or do as a sign of what the verdict should be.**

**Once the facts are decided, you must follow the law.**

**You must follow the law even if you don't agree with it.**



## Principles of Criminal Law

Certain principles of criminal law apply to all criminal cases. Although you may be familiar with them, I ask that you keep them in mind during the course of this trial:

1. The fact that the defendant has been brought before the court by the ordinary processes of the law and is on trial should not be considered by you as in any way suggesting guilt. The defendant is presumed innocent of the charge(s) made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt.
2. The burden of proving guilt is on the State. The defendant does not have to call witnesses, introduce evidence, ask questions, or otherwise prove (his) (her) innocence.

## Statement of the Case

The defendant in this case has been accused of the following crime(s):

[Here read the charges and give the relevant definitions and elements of the offenses]

## How to act as a jury member

I am now going to instruct you about the rules on how to act now that you are a jury member. Before I do, I want to tell you why you must follow these particular rules. The Minnesota judicial system has developed a number of rules, including rules of procedure and rules of evidence, on how to conduct a trial. The purpose of all these rules is to ensure that each side receives a fair trial. It is your duty to decide what the facts of the case are at the end of the trial, but you must limit yourself to what you hear and see in this courtroom during this trial. If you do not do so, then you will be denying one side or the other the fairness that this trial tries to guarantee. Your failure to follow the rules that

I am about to give you instructions that may result in an unjust outcome and may require this case to be tried again.

Here are the rules:

Do not let outsiders influence you. This includes family members and friends and anyone else who is not actually involved in this trial.

Do not discuss this case with other jury members during the trial.

You will have plenty of time to do this at the end of the trial, once you have all the evidence, and I have sent you to the jury room with my instructions and the verdict forms.

Do not talk to anyone involved in this case, the defendant, the lawyers, or the witnesses.

If anyone tries to discuss this case with you outside the courtroom, report this to me.

When you go home during the trial, do not talk to your family, friends, or others about the case. You may tell them you are a juror on a criminal case and that is all that you should tell them.

Do not report your experiences as a juror while the trial and deliberations are going on. Do not e-mail, blog, tweet, text or post anything to Twitter, Facebook, LinkedIn, Google+, YouTube, or any other social networking sites about this trial, even if I have not specifically mentioned them. Do not visit any "chat rooms" where this case may be discussed.

Do not read or listen to news reports on newspaper, magazines, radio, television, blogs, podcasts, or other media about the case.

Do not do your own investigation. Do not ask people about this case. Do not visit any of the locations mentioned in the trial. Do not use internet map applications such as Map-



Quest, Waze, Apple Maps, Bing, Nokia, or GoogleEarth or similar mapping media, to view the locations. Do not research anything about the case, including the issues, evidence, parties, attorneys, witnesses, location, or the law, through any form of written, print, electronic or Internet media, including Google, Safari, Firefox, Bing, or similar search engine.

Do not create your own demonstrations or reenactments of the events which are the subject of the case.

Why are these restrictions imposed? These restrictions are imposed because jurors must decide without distraction and based only upon the evidence presented in the courtroom. I know that for some of you, these restrictions affect your normal daily activities and may require a change in the way you are used to communicating, and perhaps even the way you are used to learning.

However, if you investigate, research, or make inquiries on your own, the trial judge has no way to make that the information you obtain is proper for this case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity which our judicial system promises.

Keep an open mind until you have heard or seen all of the evidence.

Remember you cannot consider anything you hear or learn about this case outside this courtroom.

These rules are designed to guarantee a fair trial. It is important that you understand the rules as well as the impact upon our system of justice if you do not follow them. If you do not follow these instructions, you may jeopardize the trial. This may require the whole trial to be redone and we will have to start over. You may also be penalized for your misconduct.

If you become aware that another juror may have violated



any of these rules, you must report it to me. I know that this can be a difficult thing to do, but in order to preserve the fairness that is guaranteed to (the parties) (everyone involved) it is very important that you do so.

These rules will apply until I dismiss you from this case. [A copy of these rules will be given to you to take with you to help you remember them.] I will also repeat these rules when we take a break and when you leave at the end of the day. I do not do this to insult you or because I think you are not paying attention. I do this because I understand that, in this age of electronic communication, it is a natural impulse for all of us to look things up, to discuss the things we are doing with our friends, and to post our activities on the Internet. It is not, however, an impulse we can follow during the course of the trial regarding what we have heard or seen in the trial. Once we have completed this trial and you have given your verdict, and I have discharged you from the case, you will be free to do any research you choose, or share your experiences, either directly or through your favorite electronic means.

[Give CrimJIG 2.08 when recessing the jury]

[Please keep the same chair throughout the trial. When reporting for jury duty in the morning and returning to the courthouse after lunch, report directly to the jury room. Do not linger in the hallways. Use the restrooms in the jury room rather than the public restrooms.]

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#### COMMENT

In addition to the instructions provided in CRIMJIG 1.02, which address the issues such as the elements which the jury may consider in weighing testimony or determining credibility of witnesses, rules applicable to opinion, evidence, and such other rules of law, and restrictions on consulting news sources and doing research, the Minnesota Rules of Criminal Procedure, Rule 26.03, subd. 4, provides that: “[a]fter the jury has been empanelled and sworn, and before the opening statements of counsel, the court may instruct the jury as to the respective claims of the parties and as to such other matters as will aid the jury in comprehending the trial procedure and sequence to be followed.” Further instructions may also include such matters as burden of proof,

presumption of innocence, the necessity of proof beyond a reasonable doubt, and the definition and elements of the offense, as the court may deem essential to the proper understanding of the evidence.

If the jury has not been instructed on the presumption of innocence or proof beyond a reasonable doubt before voir dire (as in CRIMJIG 1.01), these matters may be explained at this point.

## CHAPTER 2

# INSTRUCTIONS TO THE JURY DURING TRIAL

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### *Table of Instructions*

#### **CRIMJIG**

- 2.01 Cautionary Instruction on Receipt of Testimony of Other Crimes or Occurrences
  - 2.02 Cautionary Instruction on Receipt of Testimony of Other Crime—Impeachment
  - 2.03 Cautionary Instruction on Receipt of Prior Inconsistent Statement
  - 2.04 Cautionary Instruction on Demonstrative Evidence—Computer-Generated Animation
  - 2.05 Use of Interpreter
  - 2.06 (Weapon) (Firearm) as Evidence in the Courtroom
  - 2.07 Cautionary Instruction on Receipt of Testimony of Other Domestic Abuse Occurrences
  - 2.08 Cautionary Instruction at First Recess or Adjournment for the Day and During Deliberations if not Sequestered
  - 2.09 Cautionary Instruction on Accomplice Testimony
  - 2.10 Cautionary Instruction on Receipt of Testimony of Witness' Fear of Participation
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### **CRIMJIG 2.01**

#### **CAUTIONARY INSTRUCTION ON RECEIPT OF TESTIMONY OF OTHER CRIMES OR OCCURENCES**

The State is about to introduce evidence of occurrences on \_\_\_\_\_ at \_\_\_\_\_. This evidence is being offered for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint. [This evidence is not to be used to prove the character



of the defendant or that defendant acted in conformity with such character.<sup>1]</sup>

The defendant is not being tried for and may not be convicted of any offense(s) other than the charged offense(s). You are not to convict the defendant on the basis of occurrences on \_\_\_\_\_ at \_\_\_\_\_. To do so might result in unjust double punishment.

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#### COMMENT

*See also* CRIMJIG 3.16.

For discussion of relationship evidence and how it differs from Spreigl evidence, see CRIMJIG 2.07 and its Comment.

#### ***Spreigl Evidence***

This instruction should be given upon receipt of other crime or occurrence evidence (note the exception for relationship evidence set out in CRIMJIG 2.07) and as part of the final instruction (CRIMJIG 3.16) even if it is not specifically requested. *State v. Bolte*, 530 N.W.2d 191 (Minn. 1995).

The district court should not simply take the prosecution's stated purposes for the admission of other-acts evidence at face value. When prior acts are not an element of the offense, the court should follow the clear wording of Rule 404(b) and look to the real purpose for which the evidence is offered, and ensure that that purpose is one of the permitted exceptions to the rule's general exclusion of other-acts evidence. *State v. Frisinger*, 484 N.W.2d 27, 32 (Minn.1992). The Supreme Court, in *State v. Ness*, 707 N.W.2d 676 (Minn. 2006), eliminated the independent need analysis for admissibility of prior acts evidence. The court stated that the necessity element is a part of the probative value versus prejudicial effect analysis and is not an independent element. ("Henceforth, courts should address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against the potential for unfair prejudice." 707 N.W.2d at 690.

In *Ture v. State*, 681 N.W.2d 9 (Minn. 2004) the Supreme Court

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#### 2.01

<sup>1</sup>This phrase should be used when *Spreigl* evidence is introduced that only goes to the identity of defendant. *See* Minn. R. Evidence 404(b). Alternatively, the court, if the

defendant requests it, may give Eighth Circuit Model Criminal Jury Instruction 2.09. When the evidence is being properly admitted for more than one purpose, CRIMJIG 2.01 and CRIMJIG 3.16 are proper instructions. *See Ture v. State*, 681 N.W.2d 9 (Minn. 2004).

held that CRIMJIG 3.16, the companion instruction to CRIMJIG 2.01, was proper where *Spreigl* evidence is given for more than one purpose, distinguishing *State v. Broulik*, 606 N.W.2d 64 (Minn. 2000). Pursuant to *Broulik*, the alternate instructions from the Eighth Circuit (Eighth Circuit Model Instruction 2.08 or 2.09), on the specific purpose for which *Spreigl* evidence may be considered, should be provided only when requested by the defendant. The *Ture* Court commented that “instructions on particular kinds of evidence should be avoided as much as possible because they tend to inject argument into the judge’s charge.” *Ture*, 681 N.W.2d at 18 (citation omitted). The Court went on to adopt the recommendation of this Committee that arguments on the possible inferences that can be drawn from the evidence be left to the attorneys. *Id.* The Committee continues to recommend a review of the *Broulik* case to assist the judge in drafting an appropriate instruction when the defendant requests one.

The Eighth Circuit Manual Model Jury Instruction 2.09 (West 1996) provides as follows:

You [are about to hear] [have heard] evidence that the defendant previously committed [an act] [acts] similar to [the one] [those] charged in this case. You may use this evidence to help you decide [manner in which the evidence will be used to prove identity—e.g., whether the similarity between the acts previously committed and the one(s) charged in this case suggests that the same person committed all of them].

Remember, however, that the mere fact that the defendant may have committed [a similar act] [similar acts] in the past is not evidence that [he][she] committed such [an act] [acts] in this case. The defendant is on trial for the crime[s] charged and for [that] [those] crime[s] alone. You may not convict a person simply because you believe [he][she] may have committed some act[s], even bad act[s], in the past.

If the matter is contested and the parameters set forth in *Broulik* are met, then the court may choose to give this instruction rather than CRIMJIG 2.01 and CRIMJIG 3.16.

A defendant who fails to object to this instruction has forfeited the right to have the issue of its adequacy considered on appeal. *State v. Bazoff*, 300 N.W.2d 179 (Minn. 1981).

For cases addressing the admission of *Spreigl* evidence more generally see *State v. Ness*, 707 N.W.2d 676 (Minn. 2006); *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004); *State v. Stewart*, 643 N.W.2d 281 (Minn. 2002); *State v. Nelson*, 632 N.W.2d 193 (Minn. 2001); *State v. Kennedy*, 585 N.W.2d 385 (Minn. 1998).

In *State v. DeYoung*, 672 N.W.2d 208, 212 (Minn. App. 2003), the Court of Appeals held (pre-*Ture*) that when the defendant makes a

specific request that the trial court explain the limited purpose for which the evidence is admitted, it is error not to honor the request.

In *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn.1978), the Supreme Court set forth five factors to be considered in determining whether the probative value of impeachment evidence outweighs its prejudicial effect. Those factors are: (1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue. See also, *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009).



**CRIMJIG 2.02****CAUTIONARY INSTRUCTION ON RECEIPT OF  
TESTIMONY OF OTHER CRIME—IMPEACHMENT**

The evidence concerning a prior conviction of (the defendant) (\_\_\_\_\_) is admitted only for your consideration in deciding whether (the defendant) (\_\_\_\_\_) is telling the truth in this case. You must not consider this conviction as evidence of the defendant's character or conduct except as you may think it reflects on (believability) (credibility).

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**COMMENT**

Minn.R.Evid. 609.

**CRIMJIG 2.03****CAUTIONARY INSTRUCTION ON RECEIPT OF  
PRIOR INCONSISTENT STATEMENT**

The evidence that has just been received concerning a statement that \_\_\_\_\_ is alleged to have made sometime before testifying here is admitted only for the light it may cast on the truth of \_\_\_\_\_'s testimony at this trial. You must not consider the statement as evidence of the facts referred to in the statement.

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**COMMENT**

When requested, this instruction should be given at the time a prior inconsistent statement is admitted for impeachment purposes. The instruction should not be given when the rules of evidence permit the statement to be considered as substantive evidence under Minnesota Rules of Evidence, Rule 801(d)(1), (2).

**CRIMJIG 2.04****CAUTIONARY INSTRUCTION ON DEMONSTRATIVE EVIDENCE—COMPUTER-GENERATED ANIMATION**

[The State] [Defendant] is about to introduce a computer-generated animation. This does not serve as proof of any facts in itself. It is presented only to aid your understanding of a witness' testimony or other evidence here in court. If the animation is not consistent with your evaluation of the testimony or other evidence, you should disregard the animation and determine the facts from the underlying testimony or other evidence.

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**COMMENT**

In *State v. Stewart*, 643 N.W.2d 281 (Minn. 2002), the Supreme Court upheld the admission of computer-generated animation as demonstrative evidence. The *Stewart* Court emphasized, however, that the “dramatic power” of animation, “a new and powerful evidentiary tool,” requires that the trial court provide a cautionary instruction both before playing the animation to the jury and again in its final instructions to help ensure its proper use by the jury. *Id.* at 293.

See also CRIMJIG 3.24.



**CRIMJIG 2.05****USE OF INTERPRETER**

**[[Name of language] may be used during this trial.]**

Minnesota law provides that a defendant who cannot fully understand or participate in legal proceedings because of a difficulty speaking or comprehending English must be provided a qualified interpreter. This is because a defendant who lacks an understanding of the legal proceedings surrounding [her] [his] case cannot assist in the defense, challenge the accusers, and make informed choices regarding [her] [his] fundamental rights. It is through the use of qualified interpreters that defendants who cannot fully understand English are afforded the same fair treatment and opportunities in their defense as English speaking defendants.

**[The state policy is to use [interpreters] [translators] where it is the judgment of the court that it is necessary to ensure fairness in a trial.]**

**[(Name of person) speaks and understands some English, but it is my judgment that (his)(her) understanding of English is not sufficient to ensure that (he) (she) has a full understanding of the proceedings. I have therefore authorized the use of [an interpreter] [a translator] in this case.]**

**[The decision to use [an interpreter] [a translator] is my decision.]**

**[[An interpreter] [A translator] is necessary for a defendant to understand everything that is said in the courtroom. The court instructs the [interpreter] [translator] to interpret every word that is said.]**

**[The use of [an interpreter] [a translator] may make the case take longer than it would without [an interpreter] [a translator]. You should not hold this against the defendant.]**

USE NOTE

All or part of this instruction may be given in cases where translators or interpreters are used. The purpose of the instruction is to ensure that the jury understands the reason for using an interpreter or translator, that the decision to use an interpreter or translator is the court's decision and that the jury should not view any party adversely for needing an interpreter or translator.

COMMENT

See Minn. Stat. §§ 611.30 to 611.34 (2006).

See *State v. Marin*, 541 N.W.2d 370, 373 (Minn.App.1996) (holding that a language-impaired defendant enjoys a due process right to the aid of an interpreter at all crucial stages of the criminal process, which is necessary to a meaningful exercise of the defendant's constitutional rights).

Under M.S.A. § 611.30, persons “disabled in communication” are entitled to qualified interpreters so that their constitutional rights may be fully protected. A person is “disabled in communication” when, because of a hearing speech or other communication disorder, or because of a difficulty in speaking or comprehending the English language, they cannot fully understand the proceedings or any charges made against them, or the seizure of their property, or they are incapable of presenting or assisting in the presentation of a defense. M.S.A. § 611.31. Under the interpreter-related statutes, the courts are given broad discretion in determining whether an interpreter shall be appointed, so long as the failure to appoint an interpreter does not hamper the accused in the presentation of his or her defense. See *State v. Cham*, 680 N.W.2d 121 (Minn. App. 2004) (court has broad discretion based on its first-hand view of indicators that a person is handicapped in communications<sup>1</sup>); *State v. Yang*, 627 N.W.2d 666 (Minn. App. 2001) (court did not abuse discretion in refusing to appoint an interpreter for witness where witness had already testified without interpreter); *State v. Marin*, 541 N.W.2d 370 (Minn. App.1996) (citing *Ton v. State*, 878 P.2d 986, 987 (Nev.1994)) (language-impaired defendant enjoys a due process right to the aid of an interpreter at all crucial stages of the criminal process, which is necessary to a meaningful exercise of the defendant's constitutional rights); *State v. Perez*, 404 N.W.2d 834 (Minn. App. 1987) (defendant demonstrated sufficient command of English that there was no need for simultaneous translation; court made an interpreter available).

In *Cham*, the Minnesota Court of Appeals outlined several factors

2.05

communication” to “disabled in communication” in 2006

<sup>1</sup>The legislature amended the phrase used from “handicapped in

to aid in determining whether an interpreter should be appointed. These include: 1) mispronunciations, pauses, facial expressions, and gestures; 2) whether a party's comprehension of the proceedings or communication with counsel or the judge are inhibited; 3) the complexity of the proceedings; and 4) other indicia of language competency. *Cham*, 680 N.W.2d at 126–27. The Court goes on to suggest that a pre-trial hearing be devoted to language competency issues where the need for an interpreter is raised. *Id.* at 127.

M.S.A. § 611.30 specifies that the constitutional rights of all persons disabled in communication cannot be fully protected unless qualified interpreters are available to assist them in proceedings. M.S.A. § 611.31 defines “person disabled in communication.” M.S.A. § 611.32 defines the proceedings in which interpreters must be appointed. M.S.A. § 611.33 defines a qualified interpreter. M.S.A. § 611.34 states that the provisions of §§ 611.30 to 611.34 shall apply in all courts in Minnesota, and political subdivisions therein.

Violation of interpreter statute does not necessarily require exclusion of defendant's statements at trial. *See Marin*, 541 N.W.2d at 373; *State v Mitjans*, 408 N.W.2d 824, 829 (Minn.1987).



**CRIMJIG 2.06****(WEAPON) (FIREARM) AS EVIDENCE IN THE  
COURTROOM**

At some point in this trial a (weapon) (firearm) will be brought into the courtroom and offered as evidence. Any (weapon) (firearm) will be secured in a way to ensure it can be safely handled.

[You should know that:

1. The firearm has been examined and will come into the courtroom unloaded and secured with a device that will be visible to you and the court.
2. The firearm securing device will be such that it will be physically impossible to operate the firing mechanism of the firearm or put a bullet into the firearm.
3. The firearm securing device will be locked and the key will be maintained by court staff.]

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**COMMENT**

This instruction is based upon the Minnesota Court Security Manual, Chap. 7.7-1 Weapons Introduced as Courtroom Exhibits.

**CRIMJIG 2.07****CAUTIONARY INSTRUCTION ON RECEIPT OF  
TESTIMONY OF OTHER DOMESTIC ABUSE  
OCCURRENCES**

The State is about to introduce evidence of conduct by the defendant on \_\_\_\_\_ at \_\_\_\_\_. This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between the defendant and \_\_\_\_\_ [(and) (or) other (family) (household) members] in order to assist you in determining whether the defendant committed those acts with which the defendant is charged in the complaint.

The defendant is not being tried for and may not be convicted of any behavior other than the charged offense(s). You are not to convict the defendant on the basis of conduct on \_\_\_\_\_ at \_\_\_\_\_. To do so might result in unjust double punishment.

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**COMMENT**

*See also* CRIMJIG 3.30.

*See* M.S.A. § 634.20 on evidence of similar conduct against the victim of domestic abuse or against other family or household members. Such evidence is not *Spreigl* evidence and is not subject to the *Spreigl* standards. *State v. Bell*, 719 N.W.2d 858 (Minn. 2006); *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004).

Although evidence of similar conduct is not *Spreigl* evidence, the Court of Appeals, in *State v. Meldrum*, 724 N.W.2d 15 (Minn. App. 2006), indicated a strong preference for giving the instruction on other acts or occurrences when relationship evidence is admitted. Despite the language of *State v. Bell*, 719 N.W.2d 635, 640 (Minn. 2006), that the admission of relationship evidence is not error “despite the fact that the court [does] not, on the record, engage in the probative value versus potential prejudice balancing test,” the Court of Appeals continues to make a harmless error analysis when evidence of similar conduct is admitted without a limiting instruction. To avoid this review on appeal, the Committee recommends the use of this instruction and that the court make findings on the probative value versus potential prejudice analysis.

Prior “similar conduct” is inadmissible as relationship evidence under M.S.A. § 634.20 when defendant has been previously acquitted of criminal charges based on that conduct. *State v. O’Meara*, 755 N.W.2d 29 (Minn. App. 2008).

In *State v. Lindsey*, 755 N.W.2d 752 (Minn. App. 2008) the court of appeals found that evidence of subsequent conduct, as well as prior conduct, is admissible as relationship evidence, finding the statute unambiguous, but noting further, that even had the statute been ambiguous, it would have reached the same result, since the legislature, in 2002, had amended the statute from “prior similar conduct” to “similar conduct.”



**CRIMJIG 2.08****CAUTIONARY INSTRUCTION AT FIRST RECESS  
OR ADJOURNMENT FOR THE DAY AND DURING  
DELIBERATIONS IF NOT SEQUESTERED**

We will now (recess for \_\_\_\_ minutes) (adjourn for the day). I want to remind you of the instructions I gave you earlier regarding your conduct as jurors. Please keep these in mind each time we recess and when we adjourn for the day. As I explained earlier, it is essential that you follow those rules to ensure the fairness of this trial to all the parties. While I will try to repeat the instructions to help you remember, I may not always do so. This does not mean they do not apply.

Do not let outsiders influence you. This includes family members and friends and anyone else who is not actually involved in this trial.

Do not discuss this case with other jury members during the trial.

You will have plenty of time to do this at the end of the trial, once you have all the evidence, and I have sent you to the jury room with my instructions and the verdict forms.

Do not talk to anyone involved in this case, the defendant, the lawyers, or the witnesses.

If anyone tries to discuss this case with you outside the courtroom, report this to me.

When you go home during the trial, do not talk to your family, friends, or others about the case. You may tell them you are a juror on a criminal case and that is all that you should tell them.

Do not report your experiences as a juror while the trial and deliberations are going on. Do not e-mail, blog, tweet, text or post anything to Twitter, Facebook, LinkedIn, Google+, YouTube, or other social networking sites about this trial, even

if I have not specifically mentioned them. Do not visit any “chat rooms” where this case may be discussed.

Do not read or listen to news reports on newspaper, magazines, radio, television, podcasts, or other media about the case.

Do not do your own investigation. Do not ask people about this case. Do not visit any of the locations mentioned in the trial. Do not use internet map applications such as MapQuest or GoogleEarth or similar mapping media, to view the locations. Do not research anything about the case, including the issues, evidence, parties, witnesses, location, or the law, through any form of written, print, electronic or Internet media, including Google, Safari, Firefox, Bing, or similar search engine.

Do not create your own demonstrations or reenactments of the events which are the subject of the case.

Keep an open mind until you have heard or seen all of the evidence.

Remember you cannot consider anything you hear or learn about this case outside this courtroom.

If you do not follow these instructions, you may jeopardize the trial. This may require the whole trial to be redone and we will have to start over. You may also be penalized for your misconduct.

If you become aware that another juror may have violated any of these rules, you must report it to me. I know that this can be a difficult thing to do, but in order to preserve the fairness that is guaranteed to (the parties) (everyone involved) it is very important that you do so.

## CRIMJIG 2.09

### CAUTIONARY INSTRUCTION ON ACCOMPLICE TESTIMONY<sup>1</sup>

You are about to hear testimony from \_\_\_\_\_.

(\_\_\_\_\_ is an accomplice of the defendant. "An accomplice" is a person who could be charged with the same crime as the defendant. You cannot find the defendant guilty of a crime on an accomplice's testimony unless this testimony is corroborated.)<sup>2</sup>

(You will have to consider whether or not \_\_\_\_\_ is an accomplice. "An accomplice" is a person who could be charged with the same crime as the defendant. If you find that (\_\_\_\_\_) is an accomplice, you cannot find the defendant guilty of a crime on this testimony, unless this testimony is corroborated.)<sup>3</sup>

The term "corroborate" means that other evidence supports or confirms the accomplice's testimony.

[The testimony of one accomplice does not corroborate the testimony of another accomplice. Accomplice testimony must be corroborated by evidence other than accomplice testimony before you may find the defendant guilty, but such other evidence may corroborate the testimony of each accomplice.]<sup>4</sup>

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#### COMMENT

M.S.A. § 634.04.

#### 2.09

<sup>1</sup>Trial courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice and that duty to instruct remains regardless of whether counsel for the defendant requests the instruction. *State v. Strommen*, 648 N.W.2d 681 (2002).

<sup>2</sup>Use this parenthetical when the witness has been found to be an accomplice as a matter of law. *State v. Shoop*, 441 N.W.2d 475 (Minn. 1989).

<sup>3</sup>Use this parenthetical when it is unclear whether the witness was an accomplice. In such case, the jury should decide if the witness was an accomplice. *State v. Shoop*, 441 N.W.2d 475 (Minn. 1989).

<sup>4</sup>See *State v. Wallert*, 402, NW2d 570 (Minn. App. 1987).



Trial courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice and that duty to instruct remains regardless of whether counsel for the defendant requests the instruction. *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002). *State v. Barrientos-Quintana*, 787 N.W.2d 603 (Minn. 2010).

In *State v. Shoop*, 441 N.W.2d 475 (Minn. 1989), the Supreme Court held that where it is clear as a matter of law that the witness was an accomplice, the court must so inform the jury. If it is unclear, the jury should decide whether a witness is an accomplice.

The test for whether a particular witness is an accomplice is whether the witness could have been indicted and convicted for the crime for which the defendant is charged. *State v. Pendleton*, 759 N.W.2d 900 (Minn. 2009); *State v. Lee*, 683 N.W.2d 309 (Minn. 2004). In addition, the witness must have played a knowing role in the crime. The witness' mere presence at the scene is not sufficient. *Pendleton, supra*. A person who plays some knowing role in the commission of the crime and takes no steps to thwart its completion can be held liable as an accomplice. *State v. Barrientos-Quintana*, 787 N.W.2d 603 (Minn. 2010); *State v. Ostrem* 535 N.W.2d 916 (Minn. 1995).

Corroborating evidence need only be sufficient to restore confidence in the truthfulness of the accomplice's testimony. *State v. Clark*, 755 N.W.2d 241 (Minn. 2008). Corroborating evidence need not be enough to lead the jurors to convict without accomplice testimony; it need only affirm the accomplice's truthfulness and point to the defendant's guilt in some substantial degree. *State v. Reed*, 737 N.W.2d 572 (Minn. 2007).

The testimony of an accomplice does not corroborate the testimony of another accomplice. See *State v. Walert*, 402 N.W.2d 570 (Minn. App. 1987)

**CRIMJIG 2.10****CAUTIONARY INSTRUCTION ON RECEIPT OF  
TESTIMONY OF WITNESS' FEAR OF  
PARTICIPATION**

The State is about to introduce evidence of the witness' fear of participating and testifying in this case. This evidence is being offered for the limited purpose of assisting you [in determining the witness' credibility] [explain the witness' reluctance to testify] [explaining inconsistencies in the witness' testimony]. [This evidence is not to be used to prove the character of the defendant or that defendant acted in conformity with such character. In particular, you may not use this testimony to infer that defendant is a bad person who is likely to commit a crime.]

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**COMMENT**

In determining whether to admit testimony regarding a witness' fear of testifying, the court must first balance whether the probative value of the testimony outweighs the danger of unfair prejudice, confusion of issues, or misleading the jury under Rule 403, Minn. R. Evid. as indicated in *State v. Harris*, 521 N.W.2d 348 (Minn. 1994). Note that bias induced by fear of testifying is almost always relevant because it is probative of witness credibility.

The Supreme Court, in *State v. MacArthur*, 730 N.W.2d 44 (Minn. 2007), outlined its concerns regarding the presentation of evidence of witness fear, favoring its presentation on redirect after cross-examination has made the need for the testimony clear, but indicating that it may be used cautiously on direct. It also noted the responsibility of the court to ensure that evidence of fear is not used to improperly attack the defendant's character. See also *State v. Davis*, 820 N.W.2d 525 (Minn. 2012).

# CHAPTER 3

## INSTRUCTIONS TO JURY AT CLOSE OF CASE

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- 3.02 Presumption of Innocence
- 3.03 Proof Beyond a Reasonable Doubt
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## CRIMJIG

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  - 3.33 “Possession”—Defined
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**CRIMJIG 3.01****DUTIES OF JUDGE AND JURY**

It is your duty to decide the questions of fact in this case. It is my duty to give you the rules of law you must apply in arriving at your verdict.

You must follow and apply the rules of law as I give them to you, even if you believe the law is or should be different. Deciding questions of fact is your exclusive responsibility. In doing so, you must consider all the evidence you have heard and seen in this trial, and you must disregard anything you may have heard or seen elsewhere about this case.

I have not by these instructions, nor by any ruling or expression during the trial, intended to indicate my opinion regarding the facts or the outcome of this case. If I have said or done anything that would seem to indicate such an opinion, you are to disregard it.

(In your determination of the facts, you are not to consider the possible penalties. That consideration is the responsibility of the court exclusively. Your only duty is to determine whether or not the guilt of the defendant has been proved beyond a reasonable doubt without reference to any possible penalty which may accrue.)

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COMMENT

See M.S.A. § 631.06 (“the court shall decide questions of law, except in cases of criminal defamation, and the jury shall decide questions of fact.”); Minnesota Rules of Criminal Procedure, Rule 26.03, subd. 18(5) (“The court shall not comment on the evidence or the credibility of the witnesses, but may state the respective claims of the parties.”).

In *State v. Schallock*, 281 N.W.2d 186 (Minn. 1979), the Supreme Court held that a trial court need not give a requested instruction that the jury may disregard all the testimony of any witness who has lied as to any material fact. The Court thought it sufficient if the trial court “instructs the jury as to its role as the exclusive judge of facts and as to the factors to bear in mind in assessing the credibility of witnesses, leaving to counsel the right to argue that a witness who lies in part cannot be believed at all.” *Id.* at 188. See also *State v. Henderson*, 74 N.W. 1014 (Minn. 1898) (deeming it unnecessary, and confusing, to instruct the jury that it may disregard all or any part of the testimony of a witness if it believes the witness has lied as to any material fact).

In *State v. Caswell*, 320 N.W.2d 417 (Minn. 1982), the trial court instructed the jury on the credibility of witnesses in the following manner:

“Now, if in this case you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters and you may, if you wish, reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves.”

*Id.* at 420. According to the *Caswell* Court, this instruction did not cast unwarranted doubt on the credibility of the defendant, since it did not single out the defendant (as was the case in *State v. Underwood*, 281 N.W.2d 337 (Minn. 1979)).

The imposition of punishment is a responsibility of the court, and the jury should not consider it. *State v. Finley*, 214 Minn. 228, 8 N.W.2d 217 (1943).

**CRIMJIG 3.02****PRESUMPTION OF INNOCENCE**

The defendant is presumed innocent of the charge made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt. That the defendant has been brought before the court by the ordinary processes of the law and is on trial should not be considered by you as in any way suggesting guilt. The burden of proving guilt is on the State. The defendant does not have to prove innocence.

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**COMMENT**

The jury should be instructed on the presumption of innocence before trial begins, and again in the final instructions. The presumption of innocence should be charged in the context of warning the jury that it should draw no conclusions or suspicion from the fact that the defendant is on trial. *See State v. Rivers*, 206 Minn. 85, 287 N.W. 790 (1939). The instruction on proof beyond a reasonable doubt (CRIMJIG 3.03) should be given in conjunction with the instruction on the presumption of innocence. However, while the term "proof beyond a reasonable doubt" may be repeated many times in the course of the charge, particularly with reference to the elements of the crime, it is not necessary to repeat the presumption of innocence once it has been made clear to the jury.

The Supreme Court has recommended, with respect to the presumption of innocence, that an instruction "similar to" CRIMJIG 3.02 be given. *State v. Larson*, 281 N.W.2d 481 (Minn.1979), *cert. den.*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979). The Court also held that an instruction that the defendant, who had pleaded not guilty by reason of mental illness, was presumed responsible for his acts did not undercut the presumption of innocence.

*See also* Comment to CRIMJIG 6.02 (instruction on insanity)

**Effect of not guilty plea**

An instruction "you are instructed that a defendant's plea of not guilty is not evidence of his innocence" should not be given, although it accurately states the law, "because it may confuse the jury as to the proper presumption of innocence." *State v. Fossen*, 282 N.W.2d 496 (Minn.1979). *See also State v. Hatlestad*, 347 N.W.2d 843 (Minn. App. 1984).

**Presumption of responsibility**

In *State v. Underwood*, 281 N.W.2d 337 (Minn. 1979), the Supreme



Court held it improper to instruct that “[e]xcept as otherwise provided by law, in every criminal proceeding, a person is presumed to be responsible for his acts and the burden of rebutting such a presumption is upon him” where there was no contention that the defendant was not responsible for his acts or lacked the required intent. According to the Court, “[a]n instruction of this nature may have the effect of confusing the jury and subverting the presumption of innocence so important to our judicial process.” *Id.* at 344.

The Supreme Court has recommended, with respect to the presumption of innocence, that an instruction “similar to” CRIMJIG 3.02 be given. *State v. Larson*, 281 N.W.2d 481 (Minn.1979), *cert. den.*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979). The Court also held that an instruction that the defendant, who had pleaded not guilty by reason of mental illness, was presumed responsible for his acts did not undercut the presumption of innocence. *Id.* at 486. See Comment to CRIMJIG 6.02.

**CRIMJIG 3.03****PROOF BEYOND A REASONABLE DOUBT**

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

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**COMMENT**

In *State v. Sap*, 408 N.W.2d 638 (Minn.App.1987), the Court held that the “Courts are always safe in using the instruction of CRIMJIG 3.03.”

The “morally certain” language of the first CRIMJIG 3.03 need not be given. *State v. Udstuen*, 345 N.W.2d 766 (Minn.1984); *State v. Schmieg*, 322 N.W.2d 759 (Minn.1982); *State v. Olkon*, 299 N.W.2d 89 (Minn.1980); *State v. Boykin*, 252 N.W.2d 604 (Minn. 1977).

In *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L.Ed.2d 583 (1994) the United States Supreme Court held that the Constitution does not dictate any particular form of words used in advising the jury of the Government’s burden to prove the defendant’s guilt beyond a reasonable doubt, so long as the instructions taken as a whole correctly convey the concept of proof beyond a reasonable doubt.

**CRIMJIG 3.04****DUTIES OF JURORS: SELECTION OF  
FOREPERSON; UNANIMOUS VERDICT;  
DELIBERATION; RETURN OF VERDICT; ADVISING  
OF ADDITIONAL ISSUES**

When you return to the jury room to discuss this case you must select a jury member to be foreperson. That person will lead your deliberations.

In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.

You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

The foreperson must date and sign the verdict form when you have finished your deliberations and reached a verdict.

When you agree on a verdict, notify the (bailiff) (jury attendant).

You will return to the courtroom where your verdict will be received and read out loud in your presence.

[After you return your verdict, there may be additional issues for you to address and decide. I will instruct you further at that time.<sup>1</sup>]

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**3.04**

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<sup>1</sup>The bracketed instruction should be given only when there is a

possibility of a bifurcated *Blakely* proceeding, as provided under Rule Crim. Proc. 11.04, subd. 2 and



## COMMENT

In *State v. Jones*, 556 N.W.2d 903 (Minn. 1996) and *State v. Buggs*, 581 N.W.2d 329 (Minn. 1998), the Supreme Court suggested that the risk of error in jury instructions can be significantly reduced if the trial court uses CRIMJIG 3.04 as written when the jury requests further instructions. See *State v. Cox*, 820 N.W.2d 540 (Minn. 2012).

If the jury is deadlocked, this instruction may be read to them, but only if it was given in the original charge. *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973). The traditional *Allen* charge (see 164 U.S. 492, 17 S. Ct. 154, 41 L.Ed. 528) should not be used. *Martin*, 211 N.W.2d at 772.

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CRIMJIG 8.01, in order to alert the jurors that they may have further duties after returning the verdict.

**CRIMJIG 3.05****DIRECT AND CIRCUMSTANTIAL EVIDENCE**

A fact may be proven by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.

A fact is proven by direct evidence when, for example, it is proven by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proven by circumstantial evidence when its existence can be reasonably inferred from other facts proven in the case.

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**COMMENT**

In *State v. Hardy*, 303 N.W.2d 57 (Minn. 1981), and *State v. Turnipseed*, 297 N.W.2d 308 (Minn. 1980), the Minnesota Supreme Court upheld the use of this instruction. See *State v. Fox*, — N.W.2d — (Minn. 2015)

In *State v. Gassler*, 505 N.W.2d 62 (Minn. 1993), the Minnesota Supreme Court clarified the holding of *State v. Webb*, 440 N.W.2d 426 (Minn. 1989). The Court held that while in *Webb* it used the “rational hypothesis” language concerning circumstantial evidence, that analysis should only be applied to a test of the sufficiency of evidence to sustain a conviction on appeal. The Court held that this test does not apply to jury instructions and that the instruction of CRIMJIG 3.05 was an appropriate instruction concerning circumstantial evidence.

For further discussion see *State v. Jones*, 516 N.W.2d 545 (Minn. 1994) (declining to require an instruction containing language that “the circumstantial evidence must do more than give rise to suspicion of guilt; it must point unerringly to the accused’s guilt”).

See the concurrence of Justice Meyer in *State v. Tscheu*, 758 N.W.2d 849 (Minn. 2008), for a review of the law on circumstantial evidence.

In *State v. Al-Naseer*, 788 N.W.2d 469 (Minn. 2010), the Supreme Court held that any element of an offense proven entirely by circumstantial evidence shall be subject to “heightened scrutiny” upon review. The appellate courts conduct such review without deference to the factfinder’s choice between reasonable inferences. “When reviewing the sufficiency of circumstantial evidence, in assessing the inferences drawn from the circumstances proved, the inquiry is not simply whether the inferences leading to guilt are reasonable; although that must be true in order to convict, it must also be true that there are no other reason-

able, rational inferences that are inconsistent with guilt because if any one or more circumstances found proved are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises.” 788 N.W.2d at 474 (quoting *State v. Stein*, 776 N.W.2d 709, 718 (Minn. 2010)). See also *State v. Hanson*, 790 N.W.2d 198 (Minn. App. 2010). The Committee notes that while the appellate courts in these cases have applied a “heightened scrutiny” in reviewing circumstantial evidence, they have not yet overruled prior case law nor disapproved the language in this instruction regarding the jury’s use of circumstantial evidence. The Committee, therefore, recommends no change to the instruction at this time. See *State v. Fox*, — N.W.2d — (Minn. 2015)

In *State v. Sam*, 859 N.W.2d 825 (Minn. App. 2015), the Court of Appeals indicated that the district court was to conduct the two-step “heightened scrutiny” on motion for judgment of acquittal based upon a claim of insufficiency of the evidence.



**CRIMJIG 3.06****RULINGS ON OBJECTIONS TO EVIDENCE**

During this trial I have ruled on objections to certain testimony (and exhibits). You must not concern yourself with the reasons for the rulings, since they are controlled by rules of evidence.

By admitting into evidence testimony (and exhibits) as to which objection was made, I did not intend to indicate the weight to be given such testimony (and evidence). You are not to speculate as to possible answers to questions I did not require to be answered. You are to disregard all evidence I have ordered stricken or have told you to disregard.

**CRIMJIG 3.07****INSTRUCTIONS TO BE CONSIDERED AS A WHOLE**

You must consider these instructions as a whole and regard each instruction in the light of all the others. The order in which the instructions are given is of no significance. You are free to consider the issues in any order you wish.

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**COMMENT**

*State v. Anderson*, 261 Minn. 431, 113 N.W.2d 4 (1962); *State v. Guy*, 259 Minn. 67, 105 N.W.2d 892 (1960).

**CRIMJIG 3.08****JURY MAY RETURN FOR INFORMATION**

**[The Committee recommends no instruction.]**

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**COMMENT**

It is the position of the Committee that no instruction be given, as it invites the jury to ask further questions. If the judge feels compelled to give an instruction, the Committee recommends an instruction similar to this one:

If you have a question about any part of the testimony or any legal question after you have retired for your deliberation, please address it to the judge in writing, and give it to the jury attendant.

For further guidance on the procedures called for when the jury requests to review evidence see Minn.R.Crim.P. 26.03, subd. 19.

In *State v. Spaulding*, 296 N.W.2d 870 (Minn. 1980), the Court considered it an abuse of discretion to instruct the jury that no testimony would be reread and to categorically refuse to consider the jury's request to read the defendant's testimony.



**CRIMJIG 3.09****NOTES TAKEN BY JURORS**

You have been allowed to take notes during the trial. You may take those notes with you to the jury room. You should not consider these notes binding or conclusive, whether they are your notes or those of another juror. The notes should be used as an aid to your memory and not as a substitute for it. It is your recollection of the evidence that should control. You should disregard anything contrary to your recollection that may appear from your own notes or those of another juror. You should not give greater weight to a particular piece of evidence solely because it is referred to in a note taken by a juror.

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**COMMENT**

The taking of notes by jurors is authorized by Minnesota Rules of Criminal Procedure, Rule 26.03, subd. 12.

**CRIMJIG 3.10**

**MASCULINE OR FEMININE FORM OF PRONOUN—  
SINGULAR OR PLURAL NOUNS AND PRONOUNS**

**[The Committee recommends no instruction.]**

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**COMMENT**

M.S.A. § 645.08.

In *State v. Hennum*, 428 N.W.2d 859 (Minn. App. 1988), *affirmed in part, reversed in part*, 441 N.W.2d 793 (Minn. 1989), the Court of Appeals supported the use of gender neutral instructions. Accordingly, the Committee has made every effort to make all instructions gender neutral.

**CRIMJIG 3.11****STATEMENTS OF JUDGE AND ATTORNEYS**

Attorneys are officers of the court. It is their duty to make objections they think proper and to argue their client's cause. However, the arguments or other remarks of an attorney are not evidence.

If the attorneys or I have made or should make any statement as to what the evidence is, which differs from your recollection of the evidence, you should disregard the statement and rely solely on your own memory. If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement.

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**COMMENT**

In *State v. Haase*, 341 N.W.2d 879 (Minn. 1984), *State v. Sharpe*, 339 N.W.2d 57 (Minn. 1983), and *State v. Schmieg*, 322 N.W.2d 759 (Minn. 1982), the Supreme Court, while disapproving an instruction to the effect that defense counsel had a duty to present evidence, held that it was not plain error if such an instruction were given.



**CRIMJIG 3.12****EVALUATION OF TESTIMONY—BELIEVABILITY  
OF WITNESSES**

**You are the sole judges of whether a witness is to be believed and of the weight to be given a witness's testimony. There are no hard and fast rules to guide you in this respect. In determining believability and weight of testimony, you may take into consideration the witness's:**

- [1] Interest or lack of interest in the outcome of the case,**
- [2] Relationship to the parties,**
- [3] Ability and opportunity to know, remember, and relate the facts,**
- [4] Manner,**
- [5] Age and experience,**
- [6] Frankness and sincerity, or lack thereof,**
- [7] Reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case,**
- [8] [Any impeachment of the witness's testimony],<sup>1</sup>**
- [9] And any other factors that bear on believability and weight.**

**You should rely in the last analysis upon your own experience, good judgment, and common sense.**

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**COMMENT**

The Supreme Court has recommended that the jury be instructed to evaluate the credibility of witnesses by using the considerations set

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**3.12**  
<sup>1</sup>CRIMJIG 3.15 should be given

following this instruction if any impeachment testimony has been offered.

out in the civil jury instruction guides, which the Court deems equally valid for criminal cases. *State v. Larson*, 281 N.W.2d 481, 485 n.3 (Minn. 1979), *cert. denied*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979).

In *State v. Schallock*, 281 N.W.2d 186 (Minn. 1979), the Supreme Court held that a trial court need not give a requested instruction that the jury may disregard all the testimony of any witness who has lied as to any material fact. The Court thought it sufficient if the trial court “instructs the jury as to its role as the exclusive judge of facts and as to the factors to bear in mind in assessing the credibility of witnesses, leaving to counsel the right to argue that a witness who lies in part cannot be believed at all.” *Id.* at 188. *See also State v. Henderson*, 74 N.W. 1014 (Minn. 1898) (deeming it unnecessary, and confusing, to instruct the jury that it may disregard all or any part of the testimony of a witness if it believes the witness has lied as to any material fact).

**CRIMJIG 3.13****EXPERT TESTIMONY**

A witness who has special training, education, or experience in a particular science, occupation, or calling, is allowed to express an opinion as to certain facts. In determining the believability and weight to be given such opinion evidence, you may consider:

[1] The education, training, experience, knowledge, and ability of the witness,

[2] The reasons given for the opinion,

[3] The sources of the information,

[4] Factors already given you for evaluating the testimony of any witness.

Such opinion evidence is entitled to neither more nor less consideration by you than any other evidence.

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**COMMENT**

In *State v. Larson*, 281 N.W.2d 481 (Minn. 1979), *cert. denied*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979), the Court held that, generally, “the jury should be entitled to take into account an expert’s court-appointed status in determining the amount of weight to accord his testimony.” The Court held that the trial court had erred in instructing the jury that the testimony of such an expert witness was not entitled to more or less weight than other expert testimony merely because the witness was appointed by the court to examine the defendant. *Id.* at 485. However, the court held that the error was not prejudicial. *Id.* The Court also held that it would have been improper for the trial court to have specifically instructed the jury that they could take into account the fact of the court-appointed expert witness’s status. *Id.*



**CRIMJIG 3.14****EVALUATION OF DEPOSITION EVIDENCE**

Testimony [will now be] [has been] presented to you by way of [videotape] deposition. The testimony of a witness [who for some reason cannot be present to testify in person] may be presented in this form. Such testimony is under oath and is entitled to neither more nor less consideration by you because it was so presented. You are to judge its believability and weight in the same manner as you would if the witness had been present in court [except, of course, you should disregard the manner or appearance of the person reading the deposition in court in evaluating the evidence].

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**COMMENT**

This instruction should not be given when a deposition is used solely for impeachment purposes. The instruction may appropriately be given at the time the deposition is introduced, as well as at the close of the case.

**CRIMJIG 3.15****IMPEACHMENT**

In deciding the believability and weight to be given the testimony of a witness, you may consider:

[1] Evidence that the witness has been convicted of a crime. You may consider whether the kind of crime committed indicates the likelihood the witness is telling or not telling the truth. (In the case of the defendant, you must be especially careful to consider any previous conviction only as it may affect the weight of the defendant's testimony. You must not consider any previous conviction as evidence of guilt of the offense for which the defendant is on trial.)

[2] Evidence of the witness's reputation for truthfulness.

[3] Evidence of (a statement by) (or) (conduct of) the witness on some prior occasion that is inconsistent with present testimony. Evidence of any prior inconsistent (statement) (conduct) should be considered only to test the believability and weight of the witness's testimony. [In the case of the defendant, however, evidence of any statement (he) (she) may have made may be considered by you for all purposes.]

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**COMMENT**

On reputation for truthfulness, see Minnesota Rules of Evidence, Rule 604; *State v. Barrett*, 40 Minn. 65, 41 N.W. 459 (1889).

The use of prior inconsistent statements is governed by Minnesota Rules of Evidence, Rule 801(d)(1), (2). Prior inconsistent conduct, not intended as an assertion, is not considered hearsay under Minnesota Rules of Evidence, Rule 801(a), and can be admitted for substantive purposes as well as impeachment.

## CRIMJIG 3.16

### TESTIMONY AS TO OTHER CRIMES OR OCCURENCES

The State has introduced evidence of an occurrence on \_\_\_\_\_ at \_\_\_\_\_. As I told you at the time this evidence was offered, it was admitted for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the (indictment) (complaint). [This evidence is not to be used as proof of the character of the defendant or that defendant acted in conformity with such character.<sup>1</sup>]

The defendant is not being tried for and may not be convicted of any offense other than the charged offense(s). You are not to convict the defendant on the basis of any occurrence on \_\_\_\_\_ at \_\_\_\_\_. To do so might result in unjust, double punishment.

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#### COMMENT

*See also* CRIMJIG 2.01.

For discussion of relationship evidence and how it differs from *Spreigl* evidence, see CRIMJIG 2.07 and its Comment.

#### ***Spreigl* Evidence**

This instruction should be given upon receipt of other crime or occurrence evidence (note the exception for relationship evidence set out in CRIMJIG 2.07) and as part of the final instruction even if it is not specifically requested. *State v. Bolte*, 530 N.W.2d 191 (Minn. 1995).

The district court should not simply take the prosecution's stated purposes for the admission of other-acts evidence at face value. When prior acts are not an element of the offense, the court should follow the

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#### 3.16

<sup>1</sup>This phrase should be used when *Spreigl* evidence is introduced that only goes to the identity of defendant. *See* Minn. R. Evidence 404(b). Alternatively, the court, if the

defendant requests it, may give Eighth Circuit Model Criminal Jury Instruction 2.09. When the evidence is being properly admitted for more than one purpose, CRIMJIG 2.01 and CRIMJIG 3.16 are proper instructions. *See Ture v. State*, 681 N.W.2d 9 (Minn. 2004).



clear wording of Rule 404(b) and look to the real purpose for which the evidence is offered, and ensure that that purpose is one of the permitted exceptions to the rule's general exclusion of other-acts evidence. *State v. Frisinger*, 484 N.W.2d 27, 32 (Minn.1992). The Supreme Court, in *State v. Ness*, 707 N.W.2d 676 (Minn. 2006), eliminated the independent need analysis for admissibility of prior acts evidence. The court stated that the necessity element is a part of the probative value versus prejudicial effect analysis and is not an independent element. ("Henceforth, courts should address the need for *Spreigl* evidence in the context of balancing the probative value of the evidence against the potential for unfair prejudice." 707 N.W.2d at 690.

In *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn.1978), the Supreme Court set forth five factors to be considered in determining whether the probative value of impeachment evidence outweighs its prejudicial effect. Those factors are: (1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue. See also, *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009).

In *Ture v. State*, 681 N.W.2d 9 (Minn. 2004) the Supreme Court held that CRIMJIG 3.16, the companion instruction to CRIMJIG 2.01, was proper where *Spreigl* evidence is given for more than one purpose, distinguishing *State v. Broulik*, 606 N.W.2d 64 (Minn. 2000). Pursuant to *Broulik*, the alternate instructions from the Eighth Circuit (Eighth Circuit Model Instruction 2.08 or 2.09) on the specific purpose for which *Spreigl* evidence may be considered should be provided only when requested by the defendant. The *Ture* Court commented that "instructions on particular kinds of evidence should be avoided as much as possible because they tend to inject argument into the judge's charge." *Ture*, 681 N.W.2d at 18 (citation omitted). The Court went on to adopt the recommendation of this Committee that arguments on the possible inferences that can be drawn from the evidence be left to the attorneys. *Id.* The Committee continues to recommend a review of the *Broulik* case to assist the judge in drafting an appropriate instruction when the defendant requests one.

The Eighth Circuit Manual Model Jury Instruction 2.09 (West 1996) provides as follows:

You [are about to hear] [have heard] evidence that the defendant previously committed [an act] [acts] similar to [the one] [those] charged in this case. You may use this evidence to help you decide [manner in which the evidence will be used to prove identity—e.g., whether the similarity between the acts previously committed and the one(s) charged in this case suggests that the same person committed all of them].

Remember, however, that the mere fact that the defendant may have committed [a similar act] [similar acts] in the past is not evi-

dence that [he][she] committed such [an act] [acts] in this case. The defendant is on trial for the crime[s] charged and for [that] [those] crime[s] alone. You may not convict a person simply because you believe [he][she] may have committed some act[s], even bad act[s], in the past.

If the matter is contested and the parameters set forth in *Broulik* are met, then the court may choose to give this instruction rather than CRIMJIG 2.01 and CRIMJIG 3.16.

A defendant who fails to object to this instruction has forfeited the right to have the issue of its adequacy considered on appeal. *State v. Bazoff*, 300 N.W.2d 179 (Minn. 1981).

For cases addressing the admission of *Spreigl* evidence more generally see *State v. Ness*, 707 N.W.2d 676 (Minn. 2006); *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004); *State v. Stewart*, 643 N.W.2d 281 (Minn. 2002); *State v. Nelson*, 632 N.W.2d 193 (Minn. 2001); *State v. Kennedy*, 585 N.W.2d 385 (Minn. 1998).

In *State v. DeYoung*, 672 N.W.2d 208, 212 (Minn. App. 2003), the Court of Appeals held (pre-*Ture*) that when the defendant makes a specific request that the trial court explain the limited purpose for which the evidence is admitted, it is error not to honor the request.



**CRIMJIG 3.17****DEFENDANT'S RIGHT NOT TO TESTIFY**

The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.

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**COMMENT**

In *State v. Thompson*, 430 N.W.2d 151 (Minn. 1988), the Supreme Court concluded that CRIMJIG 3.17 should not be given without the personal and clear consent of the defendant. In addition, mere failure to object to the instruction does not suffice. *McCollum v. State*, 640 N.W.2d 610 (Minn. 2002). If such an instruction is requested by the defendant, the judge should also require the defendant to state on the record the desire to have such an instruction given. *Id.*; *State v. Rosen*, 158 N.W.2d 202 (1968). See also *State v. Duncan*, 608 N.W.2d 551 (Minn.App.2000), relying on *State v. Thompson*, 430 N.W.2d 151 (Minn.1988), holding that defendant does not implicitly consent to instruction by failing to object to the instruction.

In *State v. Larson*, 358 N.W.2d 668 (Minn. 1984), the Minnesota Supreme Court recognized the holding of *Lakeside v. Oregon*, 435 U.S. 333 (1978) that the giving of this instruction over the defendant's objection was constitutionally permissible. However, the Court re-affirmed its prior holding that the trial court should generally grant the request of the defendant not to give such an instruction. In *Larson*, the Court held the defense had "opened the door" in final argument by trying to use defendant's not guilty plea as a substitute for or the equivalent of testifying.



**CRIMJIG 3.18****ACCOMPLICE TESTIMONY**

You cannot find the defendant guilty of a crime on the testimony of a person who could be charged with that crime, unless that testimony is corroborated by other evidence that tends to convict the defendant of the crime. Such a person who could be charged for the same crime is called an accomplice.<sup>1</sup>

(In this case, \_\_\_\_\_ (is a) (are) person(s) who could be charged with the same crime as the defendant. You cannot find the defendant guilty of a crime on the testimony of (the) (these) accomplice(s) unless that testimony is corroborated.)

(If you find that (\_\_\_\_\_) (any person who has testified in this case) is a person who could be charged with the same crime as the defendant, you cannot find the defendant guilty of a crime on that testimony, unless that testimony is corroborated.)

The evidence that can corroborate the testimony of an accomplice must do more than merely show that a crime was committed or show the circumstances of the crime, but the corroborating evidence need not convince you by itself that the defendant committed the crime. It is enough that it tends to show that the defendant committed a crime, and that taken with the testimony of an accomplice you are convinced beyond a reasonable doubt that the defendant committed the crime.

The testimony of one accomplice does not corroborate the testimony of another accomplice. Accomplice testimony must be corroborated by evidence other than accomplice testimony before you may find the defendant guilty, but such other evidence may corroborate the testimony of each accomplice.

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**3.18**

<sup>1</sup> Trial courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness

against the defendant to be an accomplice and that duty to instruct remains regardless of whether counsel for the defendant requests the instruction. *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002).

## COMMENT

M.S.A. § 634.04.

Trial courts have a duty to instruct juries on accomplice testimony in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice and that duty to instruct remains regardless of whether counsel for the defendant requests the instruction. *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002). *State v. Barrientos-Quintana*, 787 N.W.2d 603 (Minn. 2010).

In *State v. Shoop*, 441 N.W.2d 475 (Minn. 1989), the Supreme Court held that where it is clear as a matter of law that the witness was an accomplice, the court must so inform the jury. If it is unclear, the jury should decide whether a witness is an accomplice.

The test for whether a particular witness is an accomplice is whether the witness could have been indicted and convicted for the crime for which the defendant is charged. *State v. Pendleton*, 759 N.W.2d 900 (Minn. 2009); *State v. Lee*, 683 N.W.2d 309 (Minn. 2004). In addition, the witness must have played a knowing role in the crime. The witness' mere presence at the scene is not sufficient. *Pendleton, supra*. A person who plays some knowing role in the commission of the crime and takes no steps to thwart its completion can be held liable as an accomplice. *State v. Barrientos-Quintana*, 787 N.W.2d 603 (Minn. 2010); *State v. Ostrem* 535 N.W.2d 916 (Minn. 1995).

Corroborating evidence need only be sufficient to restore confidence in the truthfulness of the accomplice's testimony. *State v. Clark*, 755 N.W.2d 241 (Minn. 2008). Corroborating evidence need not be enough to lead the jurors to convict without accomplice testimony; it need only affirm the accomplice's truthfulness and point to the defendant's guilt in some substantial degree. *State v. Reed*, 737 N.W.2d 572 (Minn. 2007).



**CRIMJIG 3.19****IDENTIFICATION TESTIMONY—CAUTIONARY  
INSTRUCTION**

Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so, you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness's view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification. (If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification.)

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**COMMENT**

CRIMJIG 3.19 has been approved as "adequate." *State v. Spann*, 287 N.W.2d 406 (Minn. 1979).

An instruction of this kind is not necessary in every case in which eyewitness testimony is involved. *State v. Bishop*, 289 Minn. 188, 183 N.W.2d 536 (1971). Where the circumstances raise any possible doubt in the court's mind as to the reliability of the identification, serious consideration should be given to a request for such an instruction. *State v. Burch*, 284 Minn. 300, 170 N.W.2d 543 (1969).

In *State v. Lindsey*, 632 N.W.2d 652 (Minn. 2001), the Court held that the trial court did not abuse its discretion by refusing to read to the jury a defendant's proposed instruction regarding the State's burden of proving identity because the instruction as proposed might have distracted jury from its obligation to make findings beyond a reasonable doubt.



**CRIMJIG 3.20****LESSER CRIMES**

The law provides that upon the prosecution of a person for a crime, if the person is not guilty of that crime, the person may be guilty of a lesser crime.

(A) (The) lesser crime(s) in this case (is) (are): \_\_\_\_\_.

The presumption of innocence and the requirement of proof beyond a reasonable doubt apply to these lesser crimes. If you find beyond a reasonable doubt that the defendant has committed each element of the lesser crime, but you have a reasonable doubt about any different element of the greater crime, the defendant is guilty only of the lesser crime.

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**COMMENT**

M.S.A. § 631.14.

An instruction on a lesser charge should be submitted when: (1) the offense in question is an “included” offense; and (2) a rational basis exists for the jury to convict appellant of the lesser offense and acquit him of the greater crime. *State v. Buntrock*, 560 N.W.2d 383 (1997).

When a defendant requests a jury instruction on a lesser-included offense, the trial court must give the instruction when (1) the lesser offense is included in the charged offense, (2) the evidence provides a rational basis for acquitting the defendant of the offense charged, and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense. *State v. Johnson*, 719 N.W.2d 619 (Minn. 2006).

In *State v. Dahlin*, 695, N.W.2d 588 (Minn. 2005), the Minnesota Supreme Court adopted a “light most favorable to the party requesting the instruction” standard for reviewing the denial of a requested lesser-included instruction by the defendant. While the court did not explicitly overrule any of its prior holdings, it is the opinion of the Committee that, in a case where the defendant presents any evidence, including his or her testimony alone, that would support a lesser-included instruction, the court must give the instruction. See also *State v. Johnson*, 719 N.W.2d 619 (Minn. 2006).

The *Dahlin* court confirmed prior holdings that the failure to request a lesser-included instruction by the defendant, even if war-

ranted by the evidence, constitutes a waiver as any such instruction. *Id.* (discussing *State v. Leinweber*, 303 Minn. 404, 228 N.W.2d 120 (1975); *State vs. Jordan*, 272 Minn. 84, 136 N.W.2d 601 (1965)). If the defendant expressly waives the right, the court may, in its discretion, withhold the instruction, see *State v. Bellecourt*, 390 N.W.2d 269 (Minn. 1986); *State v. Walker*, 306 Minn. 105, 235 N.W.2d 810 (1975), or may *sua sponte* submit such lesser degrees as the court determines—even over the objection of the prosecution or the defendant. *Leinweber*, 303 Minn. at 421, 228 N.W.2d at 125. See also *State v. Scheerle*, 285 N.W.2d 686 (1979).

The court should be careful not to indicate any order in which the crimes should be considered. It should not instruct the jury to consider the lesser crimes only if it finds the defendant not guilty of the charged offense. *State v. Leinweber*, 303 Minn. 414, 228 N.W.2d 120 (1975); *State v. Jordan*, 272 Minn. 84, 136 N.W.2d 601 (1965).

While a trial court may, on its own and even over the defendant's wishes, submit lesser offenses that are justified by the evidence, a defendant who does not request submission or object to the lack of submission of the lesser offense forfeits the right to raise on appeal a claim that the lesser offense should have been submitted. *State v. Scheerle*, 285 N.W.2d 686 (Minn. 1979).

In appropriate cases, it may be necessary to use this instruction, even though the lesser included offenses are charged as counts in the complaint. See *State v. Moore*, 458 N.W.2d 90 (Minn. 1990), *appeal after remand*, 481 N.W.2d 355 (Minn. 1992). In *State v. Bolte*, 530 N.W.2d 191 (Minn. 1995), the Supreme Court commented favorably on the Committee's recommendation that in appropriate cases this instruction should be used even when the lesser included offense is a charged count of the complaint.

**CRIMJIG 3.21**

**EVIDENCE OF CHARACTER**

**In this case you have heard evidence as to the**

**[1]    General character**

**[2]    General character and character for (insert pertinent trait)**

**[3]    Character for (insert pertinent trait)**

**of the defendant.**

**You should consider such evidence with all the other evidence in the case in determining whether or not the prosecution has proven the defendant's guilt beyond a reasonable doubt.**

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**COMMENT**

Use of the parenthetical material is pursuant to the Minnesota Rules of Evidence, Rule 404(a)(1).

The general question is discussed in *State v. Demmings*, 310 Minn. 152, 246 N.W.2d 31 (1976) and cases cited therein. The instruction may be given by the Court on its own motion. However, failure to give the instruction is not error unless specifically requested by the defendant. *State v. Crace*, 289 N.W.2d 54 (Minn.1979.)

As to the character of a victim, see Minnesota Rules of Evidence, Rule 404(a)(2), and as to the character of a witness, Minnesota Rules of Evidence, Rule 608.



**CRIMJIG 3.22****PRE-HYPNOTIC RECALL TESTIMONY**

There has been testimony that a witness has been hypnotized and while under hypnosis was questioned about matters concerning this case. In evaluating the testimony of this witness, you should understand that hypnosis usually increases a person's confidence in his or her recollection.

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**COMMENT**

In *State v. Mack*, 292 N.W.2d 764 (Minn. 1980), the Minnesota Supreme Court held that the testimony of a previously hypnotized witness concerning the subject matter adduced at the pretrial hypnotic interview was inadmissible in a criminal proceeding. However, this prohibition has been interpreted to exclude from trial only those recollections recalled for the first time during hypnosis, while matters disclosed by the witness prior to the hypnosis may still be presented at trial. *State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982); *State v. Koehler*, 312 N.W.2d 108 (Minn. 1981); *In re J.R.D.*, 342 N.W.2d 162 (Minn. App. 1984).

In *Rodriguez v. State*, 345 N.W.2d 781 (Minn. App. 1984), the Court of Appeals established a set of standards by which the trial court is to determine the admissibility of the prehypnotic recall testimony of a subsequently hypnotized witness. The Court held that "[a]t the opposing party's request, the court shall charge the jury that hypnosis usually increases a witness's confidence in his recollections. Otherwise, no mention of hypnosis shall be made in the instructions."

In *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987), the Supreme Court reversed the defendant's conviction on the ground that the trial court may have improperly excluded from evidence some of her testimony that had been hypnotically refreshed. The Court held it was unconstitutional to impose a per se exclusion to all such testimony by the defendant, and ruled such testimony should be dealt with on a case-by-case basis, subject to broad state-imposed guidelines.

**CRIMJIG 3.23****MULTIPLE OFFENSES CONSIDERED SEPARATELY**

In this case, the defendant has been charged with multiple offenses. You should consider each offense, and the evidence pertaining to it, separately. The fact that you may find defendant guilty or not guilty as to one of the charged offenses should not control your verdict as to any other offense.

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**COMMENT**

This instruction is designed to implement the rule announced by the Minnesota Supreme Court in *State v. Kates*, 610 N.W.2d 629 (Minn. 2000), when unrelated charges are joined under Minn. Rules of Crim.Proc. 17.03, subd. 1.

**CRIMJIG 3.24****CRIMINAL LIABILITY OF A CORPORATION**

Defendant \_\_\_\_\_ is a corporation. A corporation can be held criminally liable but only for the acts of its agents. An agent is an officer, director, employee, or other person authorized by the corporation to act on its behalf. In order for criminal liability to be imposed on a corporation, the State must prove beyond a reasonable doubt that:

(1) each of the elements of [the crime charged], as provided to you next, were committed by the corporation's agent(s);

(2) the agent(s) was acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business that was conducted criminally;

(3) the agent(s) was acting, at least in part, in furtherance of the corporation's business interests; and

(4) the criminal acts were authorized, tolerated, or ratified by corporate management. An act is ratified if, after it is performed, another agent of the corporation, having knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct.

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**COMMENT**

The seminal Minnesota decision in this area is *State v. Christy Pontiac-GMC, Inc.*, 354 N.W.2d 17 (Minn. 1984), in which the Supreme Court held a corporate defendant liable for theft and forgery, based on the acts of an employee with middle management responsibilities. More recently, the Court of Appeals in *State v. Compassionate Home Care, Inc.*, 639 N.W.2d 393 (Minn. App. 2002), in which a corporation providing home-care services was prosecuted for the criminal neglect of a vulnerable adult, urged adoption of a specific instruction on corporate criminal liability.

The language provided here substantially tracks that contained in *Christy Pontiac-GMC, Inc.* There the Court added, with respect to the



fourth element, that “ordinarily” it will be shown by circumstantial evidence, for it is not to be expected that management authorization of illegality would be expressly or openly stated. Indeed, there may be instances where the corporation is criminally liable even though the criminal activity has been expressly forbidden. What must be shown is that from all the facts and circumstances, those in positions of managerial authority or responsibility acted or failed to act in such a manner that the criminal activity reflects corporate policy, and it can be said, therefore, that the criminal act was authorized or tolerated or ratified by the corporation. *Christy Pontiac-GMC, Inc.*, 354 N.W.2d at 20.

In *State v. Wohsol, Inc.*, 670 N.W.2d 292 (Minn. App. 2003), the Court of Appeals addressed the issue of corporate liability for serving an underage patron alcohol on a corporate premises, when the corporation is a bar licensed to serve alcohol by the State. The *Wohsol* court held that language in M.S.A. § 340A.503, subd. 1(a)(1), allowing conviction if a licensee “permit[s]” underage drinking on the licensed premises, requires that the prosecution show “knowledge of the violation such that the licensee authorized, tolerated or ratified sale of intoxicating liquor to minors . . .” *Id.* at 297.

**CRIMJIG 3.25****INSTRUCTION ON DEMONSTRATIVE EVIDENCE—  
COMPUTER-GENERATED ANIMATION**

[The State] [Defendant] has introduced a computer-generated animation. As I told you at the time this evidence was presented, it does not serve as proof of any facts in itself. It was presented only to aid your understanding of (a witness') (\_\_\_\_\_) testimony or other evidence here in court. If the animation is not consistent with your evaluation of the testimony or other evidence, you should disregard the animation and determine the facts from the underlying testimony or other evidence.

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**COMMENT**

As provided in *State v. Stewart*, 643 N.W.2d 281 (Minn. 2002), the jury should be provided a cautionary instruction on the use of computer-generated animation before such evidence is introduced (*see* CRIMJIG 2.04), and during final instructions in order to ensure its proper use.

**CRIMJIG 3.26****INSTRUCTION ON DEMONSTRATIVE EXHIBITS—  
GENERALLY**

[The State] [Defendant] has introduced (a) demonstrative exhibit(s) in the form of [a chart, summary, calculation, etc.]. This information is presented [to assist you as an aid in your understanding of (a witness') (\_\_\_\_\_) testimony here in court] [to help explain the facts disclosed by the books, records, and other documents that are evidence in the case]. If the [chart, summary, calculation, etc.] is not consistent with the facts or figures shown by the evidence in this case, as you find them, you should disregard the [chart, summary, calculation, etc.] and determine the facts from the underlying evidence.

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**COMMENT**

The instruction is to be used when the exhibit is intended for demonstrative purposes only, not when the exhibit itself is received into evidence for substantive purposes.



**CRIMJIG 3.27****CHARTS, SUMMARIES, OR CALCULATIONS  
ADMITTED INTO EVIDENCE**

During the trial (the State) (the defendant) used [(a) chart(s), (a) summar(y)(ies) (or) (a) calculation(s)] [as an aid to your understanding of (a witness') (\_\_\_\_\_) testimony] [to help explain the facts disclosed by the books, records, and other documents that are evidence in the case]. [(Charts), (summaries) (or) (calculations)] are based on the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

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**COMMENT**

Minn. Rule of Evidence 1006.

The instruction is based on *Ninth Circuit Criminal Jury Instruction* 4.19 (2000), which adds that the instruction “may be unnecessary if there is no dispute as to the accuracy of the chart or summary.”

**CRIMJIG 3.28****STATEMENT OF ONE DEFENDANT IN A JOINT TRIAL**

You may consider the statement of defendant \_\_\_\_\_ only in the case against (him) (her), and not in the case against the other defendant(s). This means that you may consider defendant \_\_\_\_\_'s statement in the case against (him) (her) and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that statement in any way when you are deciding if the State has proven, beyond a reasonable doubt, its case against the other defendant(s).

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**COMMENT**

Minnesota Rule of Criminal Procedure 17.03, subd. 3(2)(b) requires action to be taken when, in a joint trial, the State seeks to admit an out-of-court statement by a co-defendant and the statement refers to, but is not admissible against, the defendant. *See also State v. DeVerney*, 592 N.W.2d 837 (Minn. 1999).

**CRIMJIG 3.29**

**DEFINITIONS OF WORDS**

During these instructions I (may) have defined certain words and phrases. If so, you are to use those definitions in your deliberations. If I have not defined a word or phrase, you should apply the common, ordinary meaning of that word or phrase.

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COMMENT

M.S.A. § 645.08



**CRIMJIG 3.30****CLOSING INSTRUCTION ON RECEIPT OF  
TESTIMONY OF OTHER DOMESTIC ABUSE  
CONDUCT**

The State has introduced evidence of conduct by the defendant on \_\_\_\_\_ at \_\_\_\_\_. As I told you at the time this evidence was offered, it was admitted for the limited purpose of demonstrating the nature and extent of the relationship between the defendant and \_\_\_\_\_ [(and) (or) other (family) (household) members] in order to assist you in determining whether the defendant committed those acts with which the defendant is charged in the complaint.

The defendant is not being tried for and may not be convicted of any behavior other than the charged offense(s). You are not to convict the defendant on the basis of similar conduct on \_\_\_\_\_ at \_\_\_\_\_. To do so might result in unjust double punishment.

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**COMMENT**

*See also* CRIMJIG 2.07.

*See* M.S.A. § 634.20 on evidence of similar conduct against the victim of domestic abuse or against other family or household members. Such evidence is not *Spreigl* evidence and is not subject to the *Spreigl* standards. *State v. Bell*, 719 N.W.2d 858 (Minn. 2006); *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004).

Although evidence of similar conduct is not *Spreigl* evidence, the Court of Appeals, in *State v. Meldrum*, 724 N.W.2d 15 (Minn. App. 2006), indicated a strong preference for giving the instruction on other acts or occurrences when relationship evidence is admitted. Despite the language in *Bell*, the Court of Appeals continues to make a harmless error analysis when evidence of similar conduct is admitted without a limiting instruction. To avoid this review on appeal, the Committee recommends the use of this instruction and that the court make findings on the probative value versus potential prejudice analysis.

Prior “similar conduct” is inadmissible as relationship evidence under M.S.A. § 634.20 when defendant has been previously acquitted of criminal charges based on that conduct. *State v. O’Meara*, 755 N.W.2d 29 (Minn. App. 2008).

In *State v. Lindsey*, 755 N.W.2d 752 (Minn. App. 2008) the court of appeals found that evidence of subsequent conduct, as well as prior conduct, is admissible as relationship evidence, finding the statute unambiguous, but noting further, that even had the statute been ambiguous, it would have reached the same result, since the legislature, in 2002, had amended the statute from “prior similar conduct” to “similar conduct.”

**CRIMJIG 3.31****CAUSATION**

“Causes”) (“Proximately causes”) means that the defendant’s acts (were a substantial factor in causing the death of \_\_\_\_\_ (victim)(or) (the defendant’s acts had a substantial part in bringing about the (event) (accident) (occurrence) (results) (injury to \_\_\_\_\_) the victim.

“Superseding cause” is a cause which comes after the original event and which alters the natural sequence of events and produces a result which would not otherwise have occurred.

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**COMMENT**

Causation questions most commonly arise, in the criminal context, in criminal vehicular operation cases. Note that while the Committee recommends looking at the causation instructions as set out in the Civil Jury Instruction Guide, Vols. 4 and 4a, Minnesota Practice Series, not all the instructions will apply in a criminal case. In particular, the causation question must focus on the whether the defendant’s acts were a substantial factor in bringing about the results and not whether the victim’s acts contributed to the result, unless it can be argued that the victim’s acts constituted a superseding cause. See *State v. Smith*, 835 N.W.2d 1 (Minn. 2013).

In *State v. Nelson*, 806 N.W.2d. 558 (Minn. App 2011) the Court of Appeals held that, in a case involving two intoxicated operators of separate motor vehicles, when the negligent conduct of two drivers intertwines to cause the death of one, the district court’s instruction must define causation so the jury is informed that to find defendant guilty it must find that the defendant’s conduct played a substantial part in bringing about the death or injury of the victim-driver. A more complete definition or explanation of negligence could be given in certain cases.



**CRIMJIG 3.32****“KNOW”—“HAD REASON TO KNOW”—  
“INTENTIONALLY”—“WITH INTENT”—  
“RECKLESSLY”—DEFINED**

“To know” requires only that the actor believes that the specified fact exists.

“Had reason to know” means that the defendant acted in conscious disregard of a substantial and unjustifiable risk that [the specified fact exists][the specified fact will result from (his) (her) conduct]. “In conscious disregard of a substantial and unjustifiable risk” means that the defendant was aware 1) there was a risk that [the specified fact exists][the specified fact will result from (his) (her) conduct]; 2) the risk was substantial; 3) there was no adequate reason for taking the risk; and the defendant disregarded the risk.

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word “intentionally.”<sup>1</sup>

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act, if successful, will cause that result.

“Recklessly” means that the defendant acted in conscious disregard of a substantial and unjustifiable risk that [the specified fact exists][the specified fact will result from (his) (her) conduct] This means the defendant (consciously) (intentionally) committed an act: 1) that created a risk 2) the risk was substantial; 3) there was no adequate reason for taking the risk; 4) the defendant was aware of the risk; and 5) the defendant disregarded it. The defendant need not have intended, however, to

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**3.32**

<sup>1</sup>Criminal intent does not require proof of knowledge of the age of a

minor, even though age is a material element in the crime in question. M.S.A. § 609.02, subd. 9(6).

cause harm.

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COMMENT

The definition of “had reason to know” is derived from *State v. Mauer*, 741 N.W.2d 107 (Minn. 2007), in which the Supreme Court, in identifying the lowest constitutional standard of behavior sufficient to meet the scienter requirement for a felony offense, adopted a recklessness standard. The case involved possession of pornography involving a minor. The numerated list is the Committee’s attempt to provide a clear explanation of the standard in terms a jury can understand.

The definition of “recklessly” is based upon the decision in *State v. Engle*, 743 N.W.2d 592 (Minn. 2008), involving the reckless discharge of a firearm within a municipality. The numerated list is the Committee’s attempt to provide a clear explanation of the standard in terms a jury can understand. The Committee relied upon *Engle* (743 N.W.2d at 8) in formulating the list.

For a discussion of the doctrine of transferred intent, as applied to premeditated murder, as well as a review of cases, see *State v. Hall*, 722 N.W.2d 472 (Minn. 2006) (instruction impermissibly relieved state of burden of proof where victim was intended victim). Premeditation will transfer with intent if the perpetrator premeditated the murder of an intended victim but accidentally killed an unintended victim. *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). See also *State v. Bakdash*, 830 N.W.2d 906 (Minn. App. 2013).



**CRIMJIG 3.33****“POSSESSION”—DEFINED**

The law recognizes two kinds of possession: “actual possession” and “constructive possession.” A person is in actual possession of \_\_\_\_\_ (an item) if (he) (she) has it on (his) (her) person or is exercising direct physical control over \_\_\_\_\_ (the item) at a given time. A person is in constructive possession of \_\_\_\_\_ (an item) if \_\_\_\_\_ (the item) was in a place under (his) (her) exclusive control to which other people did not normally have access, or if found in a place to which others had access, the person knowingly exercised dominion and control over \_\_\_\_\_<sup>1</sup> (the item). You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession.

The law also recognizes that possession may be either exclusive or joint. If one person alone has actual or constructive possession of \_\_\_\_\_ (an item), possession is exclusive. If two or more persons share actual or constructive possession of \_\_\_\_\_ (an item), possession is joint. You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that defendant had actual or constructive possession of \_\_\_\_\_ (the item), whether exclusively or jointly with others.

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**COMMENT**

In those cases where possession is an issue, the court should instruct the jury that possession may be actual or constructive, as well as exclusive or joint. *State v. Olson*, 326 N.W.2d 661 (Minn.1982); *State v. Willis*, 320 N.W.2d 726 (Minn.1982); *State v. Mollberg*, 310 Minn. 376, 246 N.W.2d 463 (1976); *State v. Florine*, 303 Minn. 103, 226 N.W.2d 609 (1975). Possession need not be by the defendant alone, but may be

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**3.33**

<sup>1</sup>In *State v. Hunter*, 857 N.W.2d 537 (Minn. App 2015) the Court of Appeals indicated that the use of the pronoun “it” created an ambiguity in

the previous version of this instruction. It is recommended the item possessed be particularly identified throughout the instruction.



shared with others. *State v. LaBarre*, 292 Minn. 228, 195 N.W.2d 435 (1972). See also *State v. Hunter*, 857 N.W.2d 537 (Minn. App. 2014), in which the Court of Appeals held that possession requires dominion and control over a controlled substance and not the place where the controlled substance is found.

A jury instruction materially and prejudicially misstates the law when it provides that defendant possessed a firearm if he exercised “authority, dominion, or control” over it. *State v. Porter*, 674 N.W.2d 424 (Minn. App. 2004).

**CRIMJIG 3.34****MANDATORY MINIMUM—POSSESSION OF A  
DANGEROUS WEAPON OR FIREARM**

[Insert Element Number] the defendant or an accomplice used, whether by brandishing, displaying, threatening with, or otherwise employing a dangerous weapon [other than a firearm]. A “dangerous weapon” means any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable<sup>1</sup> liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.

[Insert Element Number], the defendant or an accomplice was in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing a firearm at the time of the commission of the offense. A “firearm” is a device designed to be used as a weapon that expels a projectile by the force of any explosion or force of combustion.<sup>2</sup>

[Insert CRIMJIG 3.33 on Possession here.]

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**COMMENT**

M.S.A. § 609.11, subd.5 and subd. 9.

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**3.34**

subd. 6.

<sup>1</sup>For definition of combustible or flammable liquid, see M.S. A. § 609.02,

<sup>2</sup>See M.S.A. §§ 609.02, subd. 6, and M.S.A. 609.666.

## B. GENERAL PRINCIPLES OF CRIMINAL LAW

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### CHAPTER 4

## LIABILITY FOR CRIMES OF ANOTHER

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#### *Table of Instructions*

#### **CRIMJIG**

- 4.01 Liability for Crimes of Another
  - 4.02 Effect of Withdrawal
  - 4.03 Effect of Nonconviction of Other Person
  - 4.04 Liability for Crime of a Co-Conspirator
- 

### **CRIMJIG 4.01**

#### **LIABILITY FOR CRIMES OF ANOTHER**

The defendant is guilty of a crime committed by another person when the defendant has played an intentional role in aiding the commission of the crime and made no reasonable effort to prevent the crime before it was committed. "Intentional role" includes aiding, advising, hiring, counseling, conspiring with, or procuring another to commit the crime.

[A defendant's presence constitutes aiding if:

First, the defendant knew his alleged accomplices were going to or were committing a crime;

Second, the defendant intended that (his) (her) presence (and actions) aid the commission of the crime; and

(If the defendant intentionally aided another person in committing a crime, or intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it, the defendant is also guilty of any other crime the other



person commits in furtherance of the intended crime, if that other crime was reasonably foreseeable to the defendant as a probable consequence of trying to commit the intended crime.)

The defendant is guilty of a crime, however, only if the other person commits a crime. The defendant is not liable criminally for aiding, advising, hiring, counseling, conspiring, or otherwise procuring the commission of a crime, unless some crime (including an attempt) is actually committed.

If you find that that the defendant aided in the commission of the crime, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.05, subds. 1, 2.

See also Comments to CRIMJIG 2.09, CRIMJIG 3.19 and CRIMJIG 4.04.

In *State v. v. Bahtuoh*, 840 N.W.2d 804 (Minn. 2013) the Supreme Court noted that the attempt by the district court to combine the aiding and abetting instruction with the instructions on the substantive offense conflated the mental status required for each. District courts are expressly encouraged to separately instruct on accomplice liability and the underlying substantive offense so as not to confuse the different state-of-mind requirements for criminal liability as a principal and as an accomplice.

In *State v. Milton*, 821 N.W.2d 789 (Minn. 2012), the Supreme Court held that failure to instruct the jury that the jury cannot find the defendant guilty of aiding by being present unless it found that defendant knew that the alleged accomplices were going to commit a crime and that defendant intended to aid the commission of the crime was error. After reviewing the language in *Milton* and *State v. Mahkuk*, 736 N.W.675 (Minn. 2012), the Committee drafted the current language for aiding by presence.

In *State v. Earl*, 702 N.W.2d 711 (Minn. 2005), the Supreme Court, while approving CRIMJIG 4.01, directed that it contain the “reasonably foreseeable” language now included in the instruction.

In *State v. Hayes*, 431 N.W.2d 533 (Minn. 1988), the Supreme Court recognized that prior cases state that it is proper for the jury to consider the defendant’s passive conduct in connection with other circumstances

in determining whether the defendant's presence intended to aid and abet, and thereby did aid the others in committing the offense. Relying on *State v. Ulvinen*, 313 N.W.2d 425 (Minn.1981), the Court held mere inaction is not of itself enough to sustain a conviction. Therefore, it was improper for the trial court to, in effect, instruct the jury that mere acquiescence was enough to justify a conviction. However, such instruction was cured by the trial court's statement that the defendant must actually intend to acquiesce in order for there to be acquiescence. These cases should be regarded with caution in the light of *Milton*, supra.

**CRIMJIG 4.02****EFFECT OF WITHDRAWAL**

Even if the defendant aided, advised, hired, counseled, or conspired with another, or otherwise procured the commission of a crime by another person, the defendant is not liable for any crime, including the intended crime, if the defendant abandoned the purpose and made a reasonable effort to prevent the crime before the crime was committed.

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**COMMENT**

M.S.A. § 609.05, subd. 3.

*See also* CRIMJIG 5.15 (withdrawal from conspiracy).

Mere withdrawal is insufficient where defendant left the victim tied up. *State v. Russell*, 503 N.W.2d 110 (Minn. 1993)



**CRIMJIG 4.03**

**EFFECT OF NONCONVICTION OF OTHER PERSON**

If the defendant aided, advised, hired, counseled, or conspired with another, or otherwise procured the commission of a crime by another person, and the crime was committed, the defendant is guilty of the crime. You are not to concern yourselves with what action, if any, was taken against the other person.

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**COMMENT**

M.S.A. § 609.05, subd. 4.

**CRIMJIG 4.04****LIABILITY FOR CRIME OF A CO-CONSPIRATOR**

The defendant is guilty of a crime committed by another person when the defendant has conspired with the other to commit the crime.

(If the defendant conspired with another person to commit a crime, the defendant is also guilty of any other crime which that person commits in furtherance of the conspiracy or while trying to commit the intended crime, if that other crime was reasonably foreseeable to the defendant as a probable consequence of furthering the conspiracy or trying to commit the intended crime.)

The defendant is guilty of a crime, other than the crime of conspiracy, however, only if the crime (including an attempt) is actually committed. (The defendant is guilty of conspiracy when the defendant has conspired to commit a crime, even though the crime is not actually carried out.)

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**COMMENT**

M.S.A. §§ 609.05(1), (2); 609.175.

*See also* CRIMJIGs 5.06 (Conspiracy), 5.07 (Conspiracy — Elements).

In *State v. Earl*, 702 N.W.2d 711 (Minn. 2005), the Supreme Court, while approving CRIMJIG 4.01, directed that it contain the “reasonably foreseeable” language now included in CRIMJIG 4.04 and CRIMJIG 4.01.

*See also State v. Tsiolis*, 202 Minn. 117, 277 N.W. 409 (1938) (holding that the defendant is “guilty of everything done by his confederate which follows the execution of the common design as one of its natural consequences.”).

## CHAPTER 5

# ANTICIPATORY CRIMES

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### *Table of Instructions*

#### **CRIMJIG**

- 5.01 Attempt—Defined
  - 5.02 —Elements
  - 5.03 Impossibility of Attempt
  - 5.04 Abandonment of Intention
  - 5.05 Commission of the Crime No Defense
  - 5.06 Conspiracy—Defined
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  - 5.08 Overt Act—Defined
  - 5.09 Completed Crime Not Necessary
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  - 5.19 Solicitation of a Mentally Impaired Person to Commit a Crime—Defined
  - 5.20 —Elements
- 

## **CRIMJIG 5.01**

### **ATTEMPT—DEFINED**

Under Minnesota law, a person is guilty of an attempt to commit a crime when, with intent to commit the crime, the person does an act that is a substantial step toward, and more than mere preparation for, the commission of the crime.

An attempt to commit a crime requires both an intent to



commit the crime and a substantial step toward the commission of the crime.

In determining whether a substantial step has been taken, you must distinguish between mere preparation for and actually beginning to commit the criminal act on the other. Mere preparation, which may consist of planning the offense or of obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. An act by a person who intends to commit a crime is an attempt if the act itself clearly indicates the intent to commit that specific crime, and it tends directly to accomplish the crime. The act itself need not be criminal in nature.

The statutes of Minnesota define the crime of \_\_\_\_\_ as follows: \_\_\_\_\_.<sup>1</sup>

The elements of a completed crime of \_\_\_\_\_ are: \_\_\_\_\_.<sup>2</sup>

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#### COMMENT

M.S.A. § 609.17, subd. 1.

A person is guilty of attempt to commit a crime if he or she, with intent to commit that crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime. *State v. Meemken*, 597 N.W. 2d 582 (Minn. App. 1999). See also *U.S. v. Solomon*, 998 F.2d 587 (8<sup>th</sup> C. A. 1993)

Specific intent which would give rise to an attempt to commit a crime is intent to commit that particular crime. Neither negligence nor recklessness includes specific intent required for an attempt. *State v. Schmitz*, 559 N.W.2d 701 (Minn. App. 1997). In *State v. Zupetz*, 322 N.W.2d 730 (Minn. 1982), the Supreme Court held that because a specific intent required for an attempted crime is not an element of the offense of manslaughter in the second degree, the defendant could not be convicted of attempted second degree manslaughter.

In *State v. Dumas*, 118 Minn. 77, 136 N.W. 311 (1912), the Supreme Court held that the defendant's overt act(s) "need not be such that, if not interrupted, . . . must result in the commission of the crime." The

#### 5.01

#### CRIMJIG.

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<sup>1</sup>Read appropriate statute or "Defined" section of appropriate

<sup>2</sup>Read "Elements" section of appropriate CRIMJIG.

Criminal Code Advisory Committee's comments make it clear that this remains the law under the present statute.

In *State v. Olkon*, 299 N.W.2d 89 (Minn. 1980), *cert. denied*, 449 U.S. 1132, 101 S. Ct. 954, 67 L.Ed.2d 119 (1981), the Supreme Court held that attempt and conspiracy are separate and distinct crimes.

**CRIMJIG 5.02****ATTEMPT—ELEMENTS**

The elements of an attempt to commit \_\_\_\_\_ are:

First, the defendant intended to commit the crime of \_\_\_\_\_. The statutes of Minnesota define that crime as follows: \_\_\_\_\_.<sup>1</sup>

Second, the defendant did an act that was a substantial step toward, and more than mere preparation for, the commission of that crime.<sup>2</sup>

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.17, subd. 1.

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**5.02**

<sup>1</sup>The "Defined" and, if necessary, the "Elements" instruction for the appropriate crime should be read. If it is desired to give the elements of the crime or to provide a further definition, this should be done immediately after reading this instruction.

<sup>2</sup>An attempt is committed if there is an intent to commit the crime and any substantial step is taken towards its commission. The Committee does not believe it is necessary to charge any specific step or to instruct the jury that they must find that any particular step was taken.



**CRIMJIG 5.03****IMPOSSIBILITY OF ATTEMPT**

Even though the commission of a crime was impossible because of the circumstances under which the act was performed or because of the inadequacy of the means employed, a person is guilty of an attempt to commit that crime if the person intended to commit the crime and took a substantial step toward its commission. However, if the impossibility of committing the crime would have been obvious to a person of normal understanding, you cannot find that an attempt to commit a crime occurred.

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**COMMENT**

M.S.A. § 609.17, subd. 2.

The Criminal Code Advisory Committee commented: "The phrase 'unless such impossibility would have been clearly evident to a person of normal understanding' is designed to exclude cases of such obvious impossibility that some other explanation than normal criminal design must account for the act."

In *State v. Bird*, 285 N.W.2d 481 (Minn. 1979), the Supreme Court held that the defense of legal impossibility could not be invoked to bar a prosecution for attempt or conspiracy.

**CRIMJIG 5.04****ABANDONMENT OF INTENTION**

If the defendant voluntarily and in good faith desisted and abandoned the intention to commit a crime, and because of this, the crime was not committed, the defendant is not guilty of an attempt, even though the defendant had already taken a substantial step toward the commission of the crime. The burden of proof is on the State to prove beyond a reasonable doubt that the defendant did not voluntarily and in good faith abandon the intent to commit a crime.

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**COMMENT**

M.S.A. § 609.17, subd. 3.

**CRIMJIG 5.05**

**COMMISSION OF THE CRIME NO DEFENSE**

The defendant is charged with an attempt to commit the crime of \_\_\_\_\_. It is not a defense to this charge that the crime was actually committed. Even if you find that the crime was committed, the defendant is guilty of an attempt to commit that crime if the defendant intended to commit it.

\_\_\_\_\_

**COMMENT**

This result, which common sense would dictate, is clearly intended by the Criminal Code Advisory Committee, which notes the omission of the language “but failing, to accomplish it” from the earlier statute.



**CRIMJIG 5.06****CONSPIRACY—DEFINED**

The statutes of Minnesota provide that whoever conspires with another to commit a crime is guilty of conspiracy if one or more of the parties to the conspiracy does some overt act in furtherance of the conspiracy.

[The word "whoever" means a person, firm, or corporation. A (firm) (corporation) acts through its officers, agents, or employees, and their acts, if within the scope of employment, are the acts of the (firm) (corporation).]

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**COMMENT**

M.S.A. § 609.175, subd. 2.

In *State v. Olkon*, 299 N.W.2d 89 (Minn. 1980), *cert. denied*, 449 U.S. 1132, 101 S. Ct. 954, 67 L.Ed.2d 119 (1981), the Supreme Court held that an attempt and conspiracy are separate and distinct crimes.

**CRIMJIG 5.07****CONSPIRACY—ELEMENTS**

The elements of conspiracy to commit \_\_\_\_\_ are:

First, the defendant conspired with \_\_\_\_\_ (or one or more of them) (another) to commit the crime of \_\_\_\_\_. A (person) (firm) (corporation) conspires with another when (he) (she) (it) agrees with the other to commit a crime. The statutes of Minnesota define the crime of \_\_\_\_\_ as follows: \_\_\_\_\_.<sup>1</sup>

Second, the defendant or another party to the conspiracy did (the overt act) (one of the overt acts) alleged, and did so with the purpose of furthering the conspiracy. The overt act(s) alleged in this case (is) (are): \_\_\_\_\_.<sup>2</sup>

Third, the defendant entered the agreement, or an overt act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.<sup>3</sup>

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.175.

When one party to the conspiracy may not have intended to effectuate it, see CRIMJIG 5.12.

In *State v. Kuhnau*, 622 N.W.2d 552 (Minn. 2001), the Supreme Court held that it was an abuse of discretion not to give the elements of

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**5.07**

<sup>1</sup>The “Defined” and, if necessary, the “Elements” instruction for the appropriate crime should be read. If it is desired to give the elements of the crime or to provide a further definition, this should be done immediately after reading this instruction.

<sup>2</sup>The overt acts as alleged in the

indictment or complaint.

<sup>3</sup>Neither the statutes nor the cases define venue in conspiracy cases in Minnesota. Federal law views venue as appropriate in any district where an overt act is committed or where the agreement is made. *Hyde v. United States*, 225 U.S. 347, 32 S. Ct. 793, 56 L.Ed. 1114 (1912).

the crime (sale of a controlled substance) as part of the jury instruction on conspiracy when the defendant so requested. Citing to *State v. Crace*, 289 N.W.2d 54 (Minn. 1979), the Court held that “[i]t is well settled that the instructions must define the crime charged. In accordance with this, it is desirable for the court to explain the elements of the offense rather than to simply read the statutes.” *Id.* at 556. The Court went on to say:

A conscious and intentional purpose to break the law is an essential element of the crime of conspiracy and consists of two distinct crimes: the conspiracy and the substantive crime, which is the object of the conspiracy.

*Id.*



**CRIMJIG 5.08****OVERT ACT—DEFINED**

**An overt act is any action taken by one of the conspirators with the intention of furthering the accomplishment of any object of the conspiracy. The act does not itself have to be a criminal act, but it must be done with the purpose of furthering the conspiracy.**

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**COMMENT**

Since the charge alleges the overt act(s), it is usually enough that the jury be told which acts these are, and the word “overt” need not be defined, but it may be desirable to explain the term.

**CRIMJIG 5.09****COMPLETED CRIME NOT NECESSARY**

It is not necessary that the crime that was the object of the conspiracy actually have been completed or committed. As long as there was an agreement to commit that crime, and an overt act was committed with the purpose of furthering that conspiracy, the crime of conspiracy is complete.

**CRIMJIG 5.10**

**OVERT ACT NOT AGREED TO BY DEFENDANT**

The State is not required to prove that the defendant agreed to or contemplated the specific overt act(s) alleged. It must prove that if such act(s) (was) (were) done, (it was) (they were) done with the purpose of furthering the conspiracy, and (it was) (they were) reasonably related to that purpose.



**CRIMJIG 5.11****NATURE OF AGREEMENT REQUIRED**

In order to prove a conspiracy, the State need not prove that the alleged parties to the conspiracy actually met together, or prove a formal agreement to commit a crime. The existence of a conspiracy may be proven from all of the evidence tending to show intentionally concerted action to accomplish the commission of a crime. A conspiracy does not exist simply because the alleged parties to the conspiracy have done similar things, or because their actions tended to a single result. Their actions must be the result of a preconceived and mutual intention to commit a crime. If an express agreement to commit a crime is not shown, the actions of each party must show that there was a prior unlawful agreement and negate the idea of a lawful undertaking or purpose.

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**COMMENT**

*See State v. Burns*, 215 Minn. 182, 9 N.W.2d 518 (1943) (holding that direct evidence is not necessary to show a formal agreement to commit the crime charged; the agreement can be inferred from the circumstances); *Blumenthal v. United States*, 88 F.2d 522 (8th Cir.1937) (during charge to the jury, the trial judge referred to the crime charged as "the conspiracy," or "this conspiracy," inferring that the conspiracy did in fact exist. However, no prejudicial error took place because the trial judge gave additional instructions that the job of the jury was to determine whether the conspiracy actually took place).

**CRIMJIG 5.12****CONSPIRACY WITH ONE WHO INTENDS CRIME  
NOT BE COMMITTED**

A person may be guilty of a conspiracy if (he) (she) agrees with another person to commit a crime, even though the other person does not actually intend that the crime will be committed, and even if the other person intends to prevent the commission of the crime.

However, in such a case, the overt act that has been committed must be the act of a person who does intend the crime that is the purpose of the conspiracy be committed, and the act must be intended by that person to further the commission of the crime.

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**COMMENT**

In an appropriate case, this instruction may be added to the instruction on the elements of conspiracy (CRIMJIG 5.07). In such a case, the first paragraph of this instruction should be added to the First element, and the second paragraph should be added to the Second element.

The defense of legal impossibility may not be invoked to bar a prosecution for either attempt under M.S.A. § 609.17 or conspiracy under M.S.A. § 609.175. *See State v. Bird*, 285 N.W.2d 481 (Minn. 1979); *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1975).

**CRIMJIG 5.13****CRIMINAL ACT BY ANOTHER PARTY TO  
AGREEMENT**

A criminal conspiracy does not result when two or more persons agree to join to accomplish a lawful purpose and one of them intends or seeks to accomplish that purpose by committing a crime. There is, however, a criminal conspiracy if the other person(s) knew the act(s) committed (is) (are) a crime and participated in or assented to such act(s).



**CRIMJIG 5.14****NECESSITY OF KNOWLEDGE OF PURPOSE**

A person who aids in a conspiracy is not guilty of conspiracy unless the person knows the purpose of the conspiracy and agrees to pursue it.

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**COMMENT**

*See Harding v. Ohio Casualty Insurance Co.*, 230 Minn. 327, 41 N.W.2d 818 (1950) (holding that a person who joins an existing conspiracy before its consummation, with knowledge of its existence and purpose, becomes a party to the conspiracy the same as if he had originally conspired, and is liable as such).

**CRIMJIG 5.15****WITHDRAWAL FROM CONSPIRACY**

A person who has conspired with another to commit a crime, but who withdraws from the conspiracy and communicates such withdrawal to the person(s) with whom the person has conspired before an overt act is committed, is not guilty of conspiracy. The burden of proof is on the State to prove beyond a reasonable doubt that the defendant was a party to the conspiracy when an overt act was committed.

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**COMMENT**

Withdrawal from a conspiracy when the crime charged is conspiracy should be distinguished from withdrawal when a substantive crime is charged and the defendant's complicity is based upon having conspired therein. In the latter case, the defendant is not guilty if the defendant has withdrawn before the crime is committed, and if the defendant has made a reasonable effort to prevent the commission of the crime. M.S.A. § 609.05, subd. 3. In the former case, the crime is complete as soon as the overt act is done, and withdrawal thereafter is too late, but if the withdrawal comes before the overt act, mere communication of the intention to withdraw to the co-conspirators is sufficient. *State v. Currie*, 267 Minn. 294, 126 N.W.2d 389 (1964). The liability of a conspirator for the crimes of co-conspirators is covered by CRIMJIG 4.04.

*See also State v. Baynes*, 279 Minn. 423, 157 N.W.2d 371 (Minn. 1968) (holding that a defendant's second thoughts about committing crime and statement that he was "chickening out" did not constitute appropriate withdrawal when he nevertheless carried out his part in the conspiracy).

**CRIMJIG 5.16**

**INTERROGATORY AS TO CRIME INTENDED**

**[The Committee recommends no instruction.]**

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**COMMENT**

In order to avoid confusing the jury, the Committee recommends that each conspiracy involving a different underlying crime be submitted on separate verdict forms.



**CRIMJIG 5.17**

**SOLICITATION OF A JUVENILE TO COMMIT A  
CRIME—DEFINED**

The statutes of Minnesota provide that any adult who solicits or conspires with a minor to commit a criminal or delinquent act, or is an accomplice to a minor in the commission of a crime or delinquent act, is guilty of a crime.

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COMMENT

M.S.A. § 609.494.

## CRIMJIG 5.18

### SOLICITATION OF A JUVENILE TO COMMIT A CRIME—ELEMENTS

The elements of solicitation to commit a crime are:

First, the defendant (solicited) (conspired with) \_\_\_\_\_ to commit the (criminal) (delinquent act) of \_\_\_\_\_.<sup>1</sup> The statutes of Minnesota define the (crime) (delinquent act) of \_\_\_\_\_ as follows \_\_\_\_\_.<sup>2</sup> [(“Solicit” means to command, entreat, or attempt to persuade a specific person.) (“To conspire” means to agree with another to commit a crime, and one of the parties to the agreement does an overt act to further commission of the crime.)]

Second, the defendant was 18 years of age or older at the time of the (solicitation) (conspiracy).

Third, \_\_\_\_\_ was a minor at the time of the (solicitation) (conspiracy). A minor is an individual under 18 years of age.

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_, in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

This instruction is patterned after the conspiracy instruction of CRIMJIG 5.07. It would appear that the statute does not require an agreement by the minor to commit the criminal act, and that the statute makes the solicitation alone a crime.

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#### 5.18

<sup>1</sup>The crime charged in the complaint.

<sup>2</sup>The “Defined” and, if necessary, “Elements” instruction of the appropri-

ate crime should be read. If it is desired to give the elements of the crime to provide a further definition, this should be done immediately after reading this instruction.

The maximum possible sentence is dependent upon the underlying nature of the solicited crime or the intended criminal act. When the degree of the intended criminal act is in question, see the Comment to CRIMJIG 5.16.



**CRIMJIG 5.19**

**SOLICITATION OF A MENTALLY IMPAIRED  
PERSON TO COMMIT A CRIME—DEFINED**

The statutes of Minnesota provide that whoever solicits a mentally impaired person to commit a criminal act is guilty of a crime.

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**COMMENT**

M.S.A. § 609.493.

## CRIMJIG 5.20

### SOLICITATION OF A MENTALLY IMPAIRED PERSON TO COMMIT A CRIME—ELEMENTS

The elements of solicitation of a mentally impaired person to commit a crime are:

First, the defendant solicited \_\_\_\_\_ to commit the criminal act of \_\_\_\_\_.<sup>1</sup> The statutes of Minnesota define the crime of \_\_\_\_\_ as follows \_\_\_\_\_.<sup>2</sup> "Solicit" means to command, entreat, or attempt to persuade a specific person.

Second, \_\_\_\_\_ was a mentally impaired person at the time of the solicitation. A mentally impaired person is a person who, as a result of an inadequately developed or impaired intelligence or of a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to commit the criminal act.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

#### COMMENT

This instruction is patterned after the conspiracy instruction of CRIMJIG 5.07. It would appear that the statute does not require an agreement to commit the criminal act, and that the statute makes the solicitation alone a crime.

The maximum possible sentence is dependent upon the underlying nature of the solicited crime or the intended criminal act. Where the

#### 5.20

<sup>1</sup>The crime charged in the complaint.

<sup>2</sup>The "Defined" and, if necessary, "Elements" instruction of the appropri-

ate crime should be read. If it is desired to give the elements of the crime to provide a further definition this should be done immediately after reading this instruction.

degree of the intended criminal act is in question, see the Comment to CRIMJIG 5.16.



## CHAPTER 6

# DEFENSES—MENTAL ILLNESS OR DEFICIENCY

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### *Table of Instructions*

#### CRIMJIG

- 6.01 Bifurcated Trial—Instructions at Commencement of Trial
  - 6.02 Defense of Mental Illness or Mental Deficiency
  - 6.03 Burden of Proof
  - 6.04 Presumption of Responsibility
  - 6.05 Consequences of Acquittal
- 

## CRIMJIG 6.01

### BIFURCATED TRIAL—INSTRUCTIONS AT COMMENCEMENT OF TRIAL

The defendant is charged with the crime(s) of \_\_\_\_\_. The defendant has presented two defenses. The first defense is that the defendant is not guilty because the defendant did not commit the charged act(s). The second defense is that even if the defendant did commit the charged act(s), the defendant is not criminally responsible for them because the defendant was suffering from a (mental illness) (mental deficiency) at the time the acts were committed. These two issues will be tried separately.

During the first stage of these proceedings, you will decide whether or not the State has proven beyond a reasonable doubt that the defendant committed a crime. If you find that the State has not proven that the defendant committed a crime, then you will find the defendant not guilty. If you find that the State has proven beyond a reasonable doubt that the defendant committed a crime, there will be a second phase of this trial where you will hear evidence regarding the defendant's mental capacity at the time the acts were committed. You will then be asked to consider whether the defendant is not guilty of the offense because of [mental illness] [mental deficiency].

Consideration of the defendant's [mental illness] [mental deficiency] defense is only appropriate during the second stage in these proceedings. You may not consider the defense of [mental illness] [mental deficiency] during the first stage of these proceedings. Instead, in the first stage, you will decide whether the evidence proves beyond a reasonable doubt that the defendant committed a crime.

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#### COMMENT

When a defendant gives notice of both the defense of not guilty and not guilty by reason of mental illness or deficiency, the court must separate these defenses for trial. Minn.R.Crim.P. 20.02, Subd. 6. The rule, mandating a bifurcated trial, makes unnecessary the use of the procedures outlined in *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982).

#### Form of verdicts

[A] *Bifurcated trial*: Where the defendant relies on both defenses, not guilty and not guilty by reason of mental illness or deficiency, the form of the verdicts submitted to the jury at the end of the first stage of the bifurcated trial would be as follows: (1) "We, the jury, find that the elements of the offense of \_\_\_\_\_ have been proven beyond a reasonable doubt," and (2) "We, the jury, find that the elements of the offense of \_\_\_\_\_ have not been proven beyond a reasonable doubt." See the Official Comments to Minn.R.Crim.P. 20. These verdict forms would not be used where the defendant acknowledges that he committed the offense, but relies solely on the defense of not guilty by reason of mental illness or deficiency.

[B] *Second stage of bifurcated trial and at conclusion of case where the defendant relies only on defense of mental illness or deficiency*: Here the following verdict forms would be submitted to the jury: (1) "We, the jury, find the defendant not guilty of the offense of \_\_\_\_\_ by reason of [mental illness or mental deficiency.]", and (2) "We, the jury, find the defendant guilty of the offense of \_\_\_\_\_."

In *State v. Sanford*, 450 N.W.2d 580 (Minn. App. 1990), the Court of Appeals rejected a claim that Rules 20.02 and 20.03 of the Minnesota Rules of Criminal Procedure violated the defendant's rights to due process because they require a bifurcated trial when the defendant pled both not guilty and not guilty by reason of mental illness.

In *State v. Schreiber*, 558 N.W.2d 474 (Minn. 1997); *State v. Griesse*, 565 N.W.2d 419 (Minn. 1997); *State v. Brom*, 463 N.W.2d 758 (Minn. 1990), *cert. denied*, 499 U.S. 940, 111 S. Ct. 1398, 113 L.Ed.2d 453 (1991); and *State v. Persitz*, 518 N.W.2d 843 (Minn. 1994), the Supreme

Court reaffirmed its holding in *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982), that expert psychiatric testimony was inadmissible in the first portion of a bifurcated trial with respect to the issues of premeditation and intent.



**CRIMJIG 6.02****DEFENSE OF MENTAL ILLNESS OR MENTAL DEFICIENCY**

The defendant has asserted a defense of mental illness or deficiency.

Under Minnesota law, a person is not criminally liable for an act when, at the time of committing the act, the person did not know the nature of the act, or did not know that it was wrong, because of a defect of reason caused by a mental illness or deficiency.

The defense of mental illness or mental deficiency is as follows:

First, the defendant did not know the nature of the act. This means the defendant did not understand what the defendant was doing. If, because of a defect of reason, the defendant did not know what action the defendant was taking or what the consequences of the defendant's action would be, then the defendant did not know the nature of the act.

Second, even if the defendant knew the nature of the act, the defendant did not understand that the act was wrong. [The word "wrong" is used in the moral sense and does not simply refer to a violation of a statute. Stated another way, even if the defendant realized that the act violated the law, the defendant is not criminally liable if, because of a defect of reason, the defendant did not understand that the act was morally wrong.]

Third, the failure of the defendant to know the nature of the act or that it was wrong, must have been the result of a defect of reason caused by [mental illness] [mental deficiency].

The State must prove beyond a reasonable doubt that the defendant knew (the nature of (his) (her) act) (or) ((his) (her) action was wrong).

## COMMENT

The *M'Naghten* Rule, incorporated in M.S.A. § 611.026, sets the applicable standard for determining whether a criminal defendant is mentally ill or mentally deficient.

In *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982), the Supreme Court approved an instruction very similar to CRIMJIG 6.02.

Although the Supreme Court has criticized the *M'Naghten* Rule, incorporated in M.S.A. § 611.026, the Court has refused to alter this rule. See *State v. Mytych*, 292 Minn. 248, 194 N.W.2d 276, 280 (1972); *State v. Eubanks*, 277 Minn. 257, 152 N.W.2d 453, 457 (1967), *cert. denied*, 390 U.S. 964, 88 S. Ct. 1070, 19 L.Ed.2d 1165 (1968); and *State v. Dhaemers*, 276 Minn. 332, 150 N.W.2d 61 (1967). In *State v. Rawland*, 294 Minn. 17, 199 N.W.2d 774 (1972), however, the Court did broaden the scope of inquiry in these cases, but later decisions make clear that *Rawland* did not change the applicable mental illness or deficiency standard. See *State v. Larson*, 281 N.W.2d 481 (Minn. 1979), *cert. denied*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979); and *State v. Wendler*, 312 Minn. 432, 252 N.W.2d 266 (1977).

In *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982), the Supreme Court held that because the right to present evidence of mental illness is a right of constitutional dimension, the Court can define the scope of the defense. Although this approach appears to vest the Court with more control over the contours of the mental illness or deficiency defense, the Court in *Hoffman* declined to exercise this control because the Court felt the *M'Naghten* Rule sufficiently provides a “fair and just means of evaluating the actions of a defendant who claims the defense of mental illness.” A comprehensive discussion by the Supreme Court concerning the *M'Naghten* Rule and its meaning is set forth in *State v. Rawland*, 294 Minn. 17, 199 N.W.2d 774 (1972).

In decisions after *Rawland*, the Supreme Court interpreted other aspects of the *M'Naghten* Rule. In *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982), the Court explained the alternative nature of the *M'Naghten* Rule by stating, “If it appears that the defendant does not understand either the nature and quality of his act or that what he did was wrong, he is not guilty by reason of mental illness.” On at least two occasions, the Supreme Court has interpreted the word “wrong” to mean a moral wrong. See *State v. Ulm*, 326 N.W.2d 159 (Minn. 1982) and *State v. Bott*, 310 Minn. 331, 246 N.W.2d 48 (1976). The Committee followed this advice in drafting CRIMJIG 6.02, and continues to recommend giving this bracketed portion of the instruction only when relevant. The bracketed material in 6.02 should be included in the court’s charge only if the defendant has introduced evidence that would support a finding that the defendant’s mental condition prevented the defendant from recognizing the immorality of his act.

The Supreme Court has also declared that a criminal defendant



may successfully prove the mental illness defense, notwithstanding the temporary nature of the illness, see *State v. Larson*, 281 N.W.2d 481 (Minn.1979), *cert. denied*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979), or that it was induced by involuntary intoxication, see *Minneapolis v. Altimus*, 306 Minn. 462, 238 N.W.2d 851 (1976). The Supreme Court generally rejects any defense based on the doctrine of diminished responsibility unless the defendant's diminished capacity is caused by such factors as "intoxication, medication, epilepsy, infancy, or senility . . . [that] are susceptible to quantification and lay understanding." *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982).

In a trial to the court without a jury, the court may raise the defense of mental illness or deficiency by its own motion, but once the defense is raised, the usual burdens of proof become applicable. *State v. Pautz*, 299 Minn. 113, 217 N.W.2d 190 (1974). In a jury trial, it is solely the function of the jury to determine the nature of the defendant's capacity. *State v. Hoffman*, 328 N.W.2d 709 (Minn.1982). The Supreme Court has also held that the mere introduction of un rebutted expert testimony concerning the defendant's insanity does not necessarily satisfy the defendant's burden of proof on this issue. *State v. Hoskins*, 292 Minn. 111, 193 N.W.2d 802 (1972). This un rebutted evidence does not entitle the defendant to a directed verdict of not guilty by reason of mental illness.

In *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L.Ed.2d 623 (1986), the United States Supreme Court held in a non-bifurcated trial proceeding that the prosecution's use of the defendant's post-arrest and post-*Miranda* warning silence as evidence of sanity was a violation of the defendant's right to due process.

In *State v. Jolley*, 508 N.W.2d 770 (Minn.1993), the Supreme Court held that a trial court in instructing the jury on the defense of mental illness may appropriately use CRIMJIG 6.02 and need not give more specific instructions in informing the jury as to what evidence it could consider in determining whether or not the defense has met its burden of proving mental illness.



**CRIMJIG 6.03****BURDEN OF PROOF**

The defendant has the burden of proving the defense of [mental illness] [mental deficiency] by the greater weight of the evidence. This means the defendant must prove that it is more likely true than not true that because of a defect of reason caused by a [mental illness] [mental deficiency], the defendant did not know the nature of the act or did not know that it was wrong.

[During the first stage of this trial, you determined that the State proved beyond a reasonable doubt that the defendant committed the crime of \_\_\_\_\_.] If you now find that the defendant has proven by the greater weight of the evidence that the defendant did not know the nature of the act or that the defendant did not know the act was wrong, then the defendant is not guilty of by reason of [mental illness] [mental deficiency]. If you find that the defendant has not proven by the greater weight of the evidence the defense of [mental illness] [mental deficiency], the defendant is guilty.

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**COMMENT**

Only the first paragraph should be given in a case where the defendant acknowledges committing the offense, but asserts the defense of mental illness or mental deficiency. In a case where the defendant relies on both defenses (not guilty and not guilty by reason of mental illness or deficiency), the paragraph in brackets should be given. In such a case, both paragraphs should be given as part of the court's charge at the end of the second stage of the trial, and neither paragraph should be given as part of the court's charge at the end of the first stage of the bifurcated trial.

Minn.R.Crim.P. 20.02, subd. 6(4)(b), places the burden of proving the defense of mental illness or deficiency upon the defendant.

The Supreme Court has consistently held that placing this burden of proof upon the defendant is constitutional. In *State v. Bott*, 310 Minn. 331, 246 N.W.2d 48, 52 (1976), the Court upheld the constitutionality of this burden of proof allocation, and declared that the U.S. Supreme Court decision of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975), did not require a different result. Three years later,

in *State v. Larson*, 281 N.W.2d 481 (Minn. 1979), *cert. denied*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979), the Court reaffirmed this holding.

In *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982), the Supreme Court approved an instruction given by the trial court concerning the defendant's burden of proof on a mental illness/deficiency defense. CRIMJIG 6.03 is patterned after the instruction used by the trial court in *Dodis*.

**CRIMJIG 6.04****PRESUMPTION OF RESPONSIBILITY**

[The Committee recommends no instruction.]

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**COMMENT**

M.S.A. § 611.025 states in pertinent part: "A person is presumed to be responsible for the person's acts and bears the burden of rebutting such presumption." The Supreme Court has held it was not error for a trial court to instruct the jury that they could presume the defendant to be responsible for the defendant's acts, pursuant to M.S.A. § 611.025. *State v. Larson*, 281 N.W.2d 481 (Minn.1979), *cert. denied*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979); *State v. Bott*, 310 Minn. 331, 246 N.W.2d 48 (1976). However, the Court cautioned that if such an instruction is given, the trial court must be careful to distinguish between the presumption of the defendant's responsibility and the presumption of the defendant's innocence.

An instruction similar to that incorporating M.S.A. § 611.025 was given by the trial court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979). The United States Supreme Court found the instruction to be unconstitutional as violating the Fourteenth Amendment's due process requirement that the State prove every element of a criminal offense beyond a reasonable doubt, because the jury might have interpreted the presumption as impermissibly shifting the burden of proof to the defendant. This holding was re-affirmed in *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L.Ed.2d 344 (1985).



**CRIMJIG 6.05****CONSEQUENCES OF ACQUITTAL**

**[The Committee recommends no instruction.]**

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**COMMENT**

The Committee does not recommend advising the jury of any consequences a “not guilty by reason of mental illness or deficiency” verdict could have. Rule 20.02, subd. 8 of the Minnesota Rules of Criminal Procedure provides for the institution of civil commitment proceedings when a defendant is found not guilty of a crime by reason of mental illness or mental deficiency. Because of the uncertain outcome of civil commitment proceedings, nothing should be said to the jury about the status of the defendant if he is found not guilty by reason of mental illness or deficiency. *State v. Larson*, 281 N.W.2d 481 (Minn.1979), *cert. denied*, 444 U.S. 973, 100 S. Ct. 467, 62 L.Ed.2d 388 (1979); *State v. Lee*, 282 N.W.2d 896, 902 (Minn. 1979); *State v. Carignan*, 271 N.W.2d 442 (Minn. 1978); *State v. Bott*, 310 Minn. 331, 246 N.W.2d 48 (1976).

## CHAPTER 7

### DEFENSES—MISCELLANEOUS

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#### *Table of Instructions*

#### CRIMJIG

- 7.01 Duress
  - 7.02 Entrapment
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- 

### CRIMJIG 7.01

#### DURESS

The defendant asserts (he) (she) committed \_\_\_\_\_<sup>1</sup> (the crime alleged) under duress. "Duress" exists when a person commits a crime only because of a reasonable fear caused by the threats of another person engaged in the commission of the crime that the defendant would be immediately killed if (he) (she) refused to participate in the commission of the crime. This reasonable fear of immediate death must continue throughout the time the crime is being committed, and it must not have been possible for the defendant to withdraw from the crime in safety. The State must prove beyond a reasonable doubt that the defendant did not act under duress.

The defendant is not guilty of a crime if the defendant participated in the crime while under duress.

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7.01 of alleged crime

<sup>1</sup>Include Definition and Elements

(That threats of future danger to the defendant's life have been made is not a defense.)

The defendant's reasonable fear of instant death must continue throughout the time the crime is being committed, and it must not have been possible for the defendant to withdraw in safety.

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COMMENT

M.S.A. § 609.08.

In *State v. Charlton*, 338 N.W.2d 26 (Minn. 1983), the Supreme Court approved this instruction.

In a burglary prosecution wherein the accused claimed throughout trial that he was present at the time of the burglary's commission because he was acting under duress, the refusal to instruct that if an accused innocently and through stupidity accompanied an accomplice on trip but not aid, abet, or assist in breaking into a garage, the jury could find him not guilty, even though they did not believe he was acting under duress, was not error as case was not tried on that theory and evidence was insufficient to justify such an instruction. *State v. Rasmussen*, 241 Minn. 310, 63 N.W.2d 1 (1954). See also *United States v. Johnson*, 381 F. Supp. 210 (D. Minn. 1974), *affirmed*, 516 F.2d 209 (8th Cir. 1975) (instruction providing in part that "to provide a legal excuse for any criminal conduct, coercion must be present and immediate and have had such a nature to induce a well-founded fear of impending death, or serious bodily injury, and there must be no reasonable opportunity to escape the compulsion without committing a crime" was not erroneous as having effect of hampering defense counsel's argument to jury and shifting burden of proof to defendant.)

This defense is not applicable to intentional homicide, because the degree of crime is reduced to manslaughter in the first degree. M.S.A. § 609.20, subd. 3.

Although duress was available as a defense in a perjury prosecution, the trial court properly refused to broaden the defense authorized by law and embodied in CRIMJIG 7.01 to permit acquittal if the jury believed that the defendant's perjury resulted from his fear of future danger to his life. *State v. Rosillo*, 282 N.W.2d 872 (Minn. 1979).

An environment of fear and coercion is not sufficient to create a defense of duress for criminal liability. *State v. Pendleton*, 759 N.W.2d 900 (Minn. 2009).



**CRIMJIG 7.02****ENTRAPMENT**

The defendant asserts that (he) (she) was entrapped. A person is "entrapped" occurs when (he) (she) commits an act or engages in conduct otherwise criminal, if the criminal design does not originate with the person, but is conceived in the mind of a government agent, and the person is by coercion, persuasion, deceitful representation, or inducement lured into committing an act the person otherwise would not have committed and had no intention of committing.

If a person is willing and ready to commit the crime, the fact that the government agent has provided what appears to be a favorable opportunity is not a defense.

The State must prove beyond a reasonable doubt that the defendant had the ready willingness to commit the act.

A defendant is not guilty of a crime if (he) (she) was entrapped into committing the crime.

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**COMMENT**

In raising the defense of entrapment, the defendant may elect between having the issue decided by the court before trial, or by a jury at trial. Minn. Rules of Crim.Proc. 9.02; *State v. Grilli*, 304 Minn. 80, 230 N.W.2d 445 (1975). The defendant must raise the issue, but once raised, the State must disprove the defense beyond a reasonable doubt. *Id.*

The defense of entrapment will not bar conviction if the State can prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *State v. Ford*, 276 N.W.2d 178 (Minn. 1979). However, a pretrial decision, even if erroneous, by the trial court acting as a trier of fact that a defendant was the victim of entrapment constitutes an acquittal and bars further prosecution or an appeal by the State. *State v. Abraham*, 335 N.W.2d 745 (Minn. 1983).

In *State v. Grilli*, 304 Minn. 80, 230 N.W.2d 445 (1975), the Court held that the burden is on the defendant to raise by a fair preponderance of the evidence the issue of entrapment for consideration by the court or jury, as he elects. Once such an issue is raised, the burden is on the state to prove beyond a reasonable doubt that the accused was predisposed to commit the crime charged. *See also State v. Olkon*, 299

N.W.2d 89 (Minn. 1980) (upholding denial of entrapment defense).

**CRIMJIG 7.03****INTOXICATION—VOLUNTARY**

The defendant has asserted a defense of intoxication. It is generally not a defense to a crime that the defendant was intoxicated at the time of the act if the defendant voluntarily became intoxicated. However, if an element of the crime requires that the defendant had a particular intent, you should consider whether the defendant was intoxicated, and if so, whether the defendant was capable of forming the required intent. The burden of establishing intoxication is on the defendant. The defendant must prove the claim of intoxication by the greater weight of the evidence. The greater weight of the evidence means that the evidence must lead you to believe that it is more likely that the claim is true than not true. If the evidence does not lead you to believe that it is more likely that the claim is true than not true, then the claim has not been proven.

However, the State must prove beyond a reasonable doubt that the defendant had the required intent.

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**COMMENT**

M.S.A. § 609.075

The Supreme Court, in *State v. Torres*, 632 N.W.2d 609 (Minn. 2001) indicated that the defendant may not be entitled to this instruction where the evidence of intoxication does not affirmatively offer intoxication as an explanation for defendant's actions. Although defendant told police he was "all . . . coked up" and could not remember the events in question, he told the officers during the same interview that he was present during the killing and described the actions of all the participants lucidly and precisely without any reference to his own intoxication. At trial, defendant chose not to testify. The trial court refused to allow the instruction to be given. Defendant relied on accomplice testimony as to his own intoxication, which the trial court found was not sufficient evidence to support the defense. Justice Page and Chief Justice Blatz, although concurring in the result, dissented, arguing that a request for an instruction on voluntary intoxication should be granted whenever there is sufficient evidence to support a finding of intoxication, not merely when the defendant has proved intoxication to the satisfaction of the court. The court said that in order "to receive a requested voluntary intoxication jury instruction: (1) the defendant



must be charged with a specific intent crime; (2) there must be evidence sufficient to support a jury finding by a preponderance of the evidence, that the defendant was intoxicated; and (3) the defendant must offer intoxication as an explanation for his actions. 632 N.W.2d at 616.

“[B]efore the intoxication defense comes into play, a defendant must offer the intoxication as an explanation of his actions.” *State v. Rainey*, 303 Minn. 550, 226 N.W.2d 919 (1975). The Supreme Court has consistently held that the burden of proving the defense of intoxication is on the defendant. *State v. Wahlberg*, 296 N.W.2d 408 (Minn. 1980); *State v. O'Donnell*, 280 Minn. 213, 158 N.W.2d 699 (1968).

“The general rule in Minnesota is that voluntary intoxication is a defense to a criminal charge . . . only if a specific intent or purpose is an essential element of the crime charged . . . Because . . . traffic offenses with which the defendant was charged do not require a specific intent to do a prohibited act, the defense of voluntary intoxication cannot and does not apply to those offenses.” *Minneapolis v. Altimus*, 306 Minn. 462, 238 N.W.2d 851 (1976).

In *State v. Fleck*, 810 N.W.2d 303 (Minn. 2012) the Supreme Court held that the defense of voluntary intoxication pursuant to M.S.A. § 609.075 applies to specific intent crimes. The court went on to say that in a case involving an assault with the intent to cause fear (assault-fear in the court's analysis), because it involves an intent to cause a particular result (fear of bodily harm or death on the part of the victim), is a specific intent crime, the voluntary intoxication defense is available. On the other hand, an assault involving the intentional infliction of bodily harm (assault-harm), because it requires only that the defendant intentionally engage in prohibited conduct without regard to a particular result, is a general intent crime and the defense of involuntary intoxication is not available to the defendant.

The offense of fleeing a police officer by other means is a specific intent crime and the defense of involuntary intoxication is available to the defendant, if the defendant is able to satisfy the burden of production regarding evidence of intoxication. The Supreme Court held, in *State v. Wilson*, 830 N.W.2d 849 (Minn. 2013), that evidence to support a jury finding by a preponderance of evidence that defendant was intoxicated (the second prong of the test outlined in *Torres*, supra) must be evaluated in a light most favorable to the defendant by the court.

## CRIMJIG 7.04

### INTOXICATION—INVOLUNTARY

The defendant has asserted a defense of involuntary intoxication.

This defense has the following requirements.

First, the defendant was made so mentally deficient by reason of involuntary intoxication, that the defendant did not understand the nature of the act or that it was wrong. This means that the defendant must have failed to know what the defendant was doing or what the consequences of the act would be, or the defendant must have failed to realize that the act was wrong.

Second, the defendant

[1] was compelled to take the intoxicating substance against the defendant's will.

[2] was unaware that because of a particular susceptibility to it, the substance would have a grossly excessive intoxicating effect upon the defendant.

[3] was innocently mistaken as to the nature of the substance taken.

[4] became unexpectedly intoxicated as a result of taking a medically prescribed drug.

[Third, the defendant's intoxication was caused by the intoxicating substance in question and not by some other intoxicant.]

The defendant has the burden of proving each of these requirements by the greater weight of the evidence. This means the defendant must prove that it is more likely true than not true that each requirement has been proven. If the evidence does not lead you to believe that it is more likely that the claim is true than not true, then the claim has not been proven.

The defendant is not guilty of a crime if (he) (she) acted while involuntarily intoxicated.

The State must prove beyond a reasonable doubt that the defendant was not involuntarily intoxicated.

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COMMENT

In *Minneapolis v. Altimus*, 306 Minn. 462, 238 N.W.2d 851 (1976), the Supreme Court held that involuntary intoxication is a defense only if it causes temporary insanity. The four types of involuntary intoxication listed in the instruction are drawn from that opinion.

A question arises whether the burden of proof may be placed on the defendant in light of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975). For two reasons, the Committee has concluded that it should be so placed. First, the Court's opinion in *Altimus* clearly calls for this result, and the case was decided several months after *Mullaney*, although the latter is not cited. Second, since we have concluded that the burden remains on the defendant to prove the defense of ordinary mental illness, see CRIMJIG 6.02, it seems appropriate to reach the same result with respect to a temporary form. See also *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977).



**CRIMJIG 7.05****SELF-DEFENSE—GENERALLY**

The defendant asserts the defense of self-defense.

“Self-defense” means that the person used reasonable force against \_\_\_\_\_ to resist (or to aid \_\_\_\_\_ (another) in resisting) an (offense<sup>1</sup>) (assault) against the person, and such an offense was being committed or the person reasonably believed that it was.

It is lawful for a person, who is (resisting an (offense) (assault) against (his) (her) person) (or) (aiding another in resisting an (offense) (assault) against the person) and who has reasonable grounds to believe that bodily injury is about to be inflicted upon the person, to defend from an attack. In doing so, the person may use all force and means that the person reasonably believes to be necessary and that would appear to a reasonable person, in similar circumstances, to be necessary to prevent an injury that appears to be imminent. [An assault is (the intentional infliction of bodily harm upon another) (or) (an intentional attempt to inflict bodily harm upon another) (or) (an act done with intent to cause fear of immediate bodily harm or death in another).]

The kind and degree of force a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that is regarded by the law as excessive.

The legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat<sup>2</sup> or avoid the danger if reasonably possible.

**7.05**

<sup>1</sup>The offense must be an offense against the person. See M.S.A. §§ 609.06 and 609.065. The term “assault” is included in the instruction as it is the most common offense giving

rise to a self-defense claim.

<sup>2</sup>There is no duty to retreat, even against a co-resident, when acting in defense of one’s dwelling. *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001).

The defendant is not guilty of a crime if (he) (she) acted in self-defense.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

(The rule of self-defense does not authorize one to seek revenge or to take into (his) (her) own hands the punishment of an offender.)

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#### COMMENT

In *State v. Fidel*, 451 N.W.2d 350 (Minn. App. 1990), the Court of Appeals rejected the appellant's claim that the trial court improperly instructed the jury on the law of self-defense. However, while rejecting the appeal, the Court did express a preference for use of the instruction found in CRIMJIG 7.06.

In *State v. Soukup*, 656 N.W.2d 424 (Minn. App. 2003), the Court of Appeals held that self-defense is applicable to a charge of disorderly conduct where the behavior forming the basis of the offense presents the threat of bodily harm (involves a crime against the person).

There is no duty to retreat from one's own home before defending oneself, even against a co-resident. This instruction should not be given under such circumstances in conjunction with CRIMJIG 7.06 (Defense of a Dwelling). *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001). See also *State v. Baird*, 654 N.W.2d 105 (Minn. 2002) applying *Glowacki* retroactively.

Included within the concept of reasonableness would be those infrequent situations in which pursuit might be justified (such as the attacker going to another room with the stated intention of getting a weapon with which to do further violence), or situations where standing one's ground may be justified. These would be proper argument for counsel.

A number of factors are relevant to the determination of whether the level of force used was reasonable, including the age and size of victim and defendant; the victim's reputation for violence; any previous threats and/or altercations between victim and defendant; defendant's aggression, if any; victim's provocation, if any. See *State v. Basting*, 572 N.W.2d 281, 285–86 (Minn. 1997) (considering evidence of victim's and defendant's respective physical attributes, defendant's training as professional boxer, and that only victim sustained injuries in fight); *State v. Bland*, 337 N.W.2d 378, 382 (Minn. 1983) (allowing evidence of victim's reputation for violence and quarrelsome tendency to determine

whether defendant was put in fear of imminent bodily harm or which party was aggressor); *State v. Roy*, 408 N.W.2d 168, 172 (Minn. App. 1987) (considering victim and defendant of comparable size, victim sustained multiple, ultimately fatal, injuries but defendant sustained none).

A defendant claiming self-defense carries the burden of going forward with evidence to support his or her claim. *State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985). The burden is one of production, and “requires the defendant to come forward and present a sufficient threshold of evidence to make the defense one of the issues of the case.” *State v. Charlton*, 338 N.W.2d 26, 29 (Minn. 1983). Once a defendant has met this burden, the state must demonstrate that the defendant did not act in self-defense by negating one of the four elements of the defense. *State v. Spaulding*, 296 N.W.2d 870, 875 (Minn. 1980).

An instruction on self-defense should be given whenever there is evidence to support a finding that the defendant had reasonable grounds to believe that the force used was reasonably necessary to prevent immediate bodily harm to the defendant. *State v. Stephani*, 369 N.W.2d 540, 546 (Minn. App. 1985).



**CRIMJIG 7.06****SELF-DEFENSE—JUSTIFIABLE TAKING OF LIFE****In Defense of Self<sup>1</sup>**

The defendant asserts the defense of the justifiable taking of a life.

No crime is committed when a person takes the life of another, even intentionally, if the person's action was taken in resisting or preventing an offense<sup>2</sup> the person reasonably believed exposed (him) (her) (or another) to death or great bodily harm.

In order for the taking of a life to be justified for this reason, four conditions must be met. First, the defendant's act must have been done in the belief that it was necessary to avert death or great bodily harm. Second, the judgment of the defendant as to the gravity of the peril to which (he) (she) (or another) was exposed must have been reasonable under the circumstances. Third, the defendant's election to defend must have been such as a reasonable person would have made in light of the danger perceived and the existence of any alternative way of avoiding the peril. Fourth, there was no reasonable possibility of retreat to avoid the danger. All four conditions must be met.

The legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat<sup>3</sup> or avoid the danger if reasonably possible.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

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**7.06**

<sup>1</sup>Note that in cases where the defendant claims to have acted in self-defense but contends that the killing was accidental, CRIMJIG 7.06 may be more appropriate.

<sup>2</sup>The offense must be an offense

against the person. See M.S.A. §§ 609.06 and 609.065.

<sup>3</sup>There is no duty to retreat, even against a co-resident, when acting in defense of one's dwelling. *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001).

## In Defense of Dwelling

The defendant has asserted the defense of a justifiable taking of life in defense of a dwelling.

No crime is committed when a person takes the life of another, even intentionally, if the person's action was taken in preventing the commission of a felony in the defendant's (dwelling) (place of abode).

In order for a killing to be justified for this reason, three conditions must be met. First, the defendant's action was done to prevent the commission of a felony in the dwelling. Second, the defendant's judgment as to the gravity of the situation was reasonable under the circumstances. Third, the defendant's election to defend (his) (her) dwelling was such as a reasonable person would have made in light of the danger perceived. All three conditions must be met. The defendant has no duty to retreat.

The legal excuse of self-defense is available only to those who act honestly and in good faith.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

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### COMMENT

M.S.A. § 609.065.

The four conditions for defense of self, including the absence of a reasonable possibility of retreat to avoid the danger, are found in *State v. Johnson*, 719 N.W.2d 619 (Minn. 2006)

The three conditions for defense of dwelling are taken from *State v. Carothers*, 594 N.W.2d 897 (Minn. 1999). There is no duty to retreat from one's own home before defending oneself, even against a co-resident. *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001). *See also State v. Baird*, 640 N.W.2d 363 (Minn. App. 2002). But see *State v. Devens*, \_\_\_NW2d \_\_\_, in which the Supreme Court held that a defendant could not assert a defense-of-dwelling defense in a common hallway of an apartment building.

In *State v. Sanford*, 450 N.W.2d 580 (Minn. App. 1990), affirmed on



petition for post-conviction relief, *Sanford v. State*, 499 N.W.2d 496 (Minn. App. 1993), the Court of Appeals rejected the defendant's request for an instruction for a subjective standard of the reasonableness of the belief that the action taken was necessary to prevent death or great bodily harm. The Court rejected the claim and reaffirmed its holding in *State v. Boyce*, 284 Minn. 242, 170 N.W.2d 104 (1969) and CRIMJIG 7.05 that the objective standard of reason was the appropriate standard upon which the jury should be instructed. The Court further rejected the request for an "imperfect self-defense" instruction. The defendant asked the trial court to instruct the jury that if it found the defendant acted sincerely and in good faith but that his belief was unreasonable, the jury must find him guilty of manslaughter in the first or second degree.

In *State v. McCuiston*, 514 N.W.2d 802 (Minn. App. 1994), the Court of Appeals held it was reversible error to refuse to instruct the jury that the defendant was authorized to use deadly force to prevent the commission of a felony in the defendant's place of abode pursuant to the statutory language of M.S.A. § 609.065.

This instruction is not to be employed if deadly force was used to prevent a felony that was not life-threatening. *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982).

In *Hauwiller v. State*, 295 N.W.2d 641 (Minn. 1980), the Court disapproved of an instruction that as a matter of law the accused had not acted in self defense.

### **Accidental death**

In *State v. Edwards*, 343 N.W.2d 269 (Minn. 1984), the Supreme Court held that in a case of claimed self-defense when a defendant claims he pointed the gun in self-defense, but claims the shooting was accidental, CRIMJIG 7.06 should be used rather than 7.05. *See also State v. Malaski*, 330 N.W.2d 447 (Minn. 1983).

In *State v. Sanders*, 376 N.W.2d 196 (Minn. 1985), the Supreme Court, while upholding the conviction in a case in which the jury was instructed on self-defense in an instruction modeled after CRIMJIG 7.05, cautioned that the trial court must use analytic precision in instructing on self-defense. It held that where death results and the defendant contends that the defendant did not intend to kill, the court should substitute the phrase "election to defend himself in the way he did" for the phrase "election to kill." *See also State v. Smith*, 374 N.W.2d 520 (Minn. App. 1985).



**CRIMJIG 7.07****SELF-DEFENSE—REVIVAL OF AGGRESSOR'S  
RIGHT OF SELF-DEFENSE**

If the defendant began or induced the (offense<sup>1</sup>) (assault) that led to the necessity of using force in the defendant's own defense, the right of the defendant to stand (his) (her) ground and thus defend (himself) (herself) is not immediately available to (him) (her). Instead, the defendant must first have declined to carry on the assault and have honestly tried to escape from it, and must clearly and fairly have informed the adversary of a desire for peace and of abandonment of the assault. Only after the defendant has done that will the law justify the defendant in thereafter standing (his) (her) ground and using force against the other person. [An "assault" is (1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.]

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**COMMENT**

See M.S.A. § 609.02, subd. 10, for the definition of assault.

A plurality of the Minnesota Supreme Court, in *State v. Edwards*, 717 N.W.2d 405 (2006) expressed concern that the previous jury instruction on the revival of an aggressor's right of self-defense misstated the law as it would allow the jury to find forfeiture based on actions that were not sufficient to trigger the right to self-defense. Although *Edwards* involved the use of deadly force, the right to self-defense can also involve the use of reasonable force (See M.S.A. § 609.06 and M.S.A. § 609.65). The Committee has added the word "assault" throughout the instruction to reflect the most common circumstances under which forfeiture and revival of the right of self-defense occur. If the offense was not an assault, the court should identify the offense. Note that the offense must be an offense against the person. This instruction incorporates the policy choices discussed in Justice Hanson's dissent and recognizes the reasonable beliefs of the victim in responding to defendant's initial offense.

In *State v. Thompson*, 544 N.W.2d 8 (Minn. 1996), the Supreme

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**7.07**

<sup>1</sup>The offense must be an offense

against the person. See M.S.A. §§ 609.06 and 609.065.

Court rejected a claim that a first degree murder conviction should be reduced to manslaughter based upon a theory of “imperfect self-defense.” The Court ruled that such a defense is not established under Minnesota statutes, and declined to accept the invitation to adopt this new defense by court decision.

In *State v. Soukop*, 656 N.W.2d 424 (Minn. App. 2003), the Court of Appeals held that self-defense was applicable to a charge of disorderly conduct where the behavior forming the basis of the offense presents the threat of bodily harm.

A number of factors are relevant to the determination of whether the level of force used was reasonable, including the age and size of the victim and defendant; victim’s reputation for violence; any previous threats and/or altercations between victim and defendant; defendant’s aggression, if any; victim’s provocation, if any. See *State v. Basting*, 572 N.W.2d 281, 285–286 (Minn. 1997) (considering evidence of victim’s and defendant’s respective physical attributes, defendant’s training as a professional boxer, and that only victim sustained injuries in the fight); *State v. Bland*, 337 N.W.2d 378, 382 (Minn. 1983) (allowing evidence of victim’s reputation for violence and quarrelsome tendency to determine whether the defendant was put in fear of imminent bodily harm or which party was aggressor); *State v. Roy*, 408 N.W.2d 168, 172 (Minn. App. 1987) (considering victim and defendant of comparable size, victim sustained multiple, ultimately fatal, injuries but defendant sustained none.

A defendant claiming self-defense carries the burden of going forward with evidence to support his or her claim. *State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985). The burden is one of production, and “requires the defendant to come forward and present a sufficient threshold of evidence to make the defense one of the issues of the case.” *State v. Charlton*, 338 N.W.2d 26, 29 (Minn. 1983). Once a defendant has met this burden, the state must demonstrate that the defendant did not act in self-defense by negating one of the four element of the defense. *State v. Spalding*, 296 N.W.2d 870, 875 (Minn. 1980).

An instruction on self-defense should be given whenever there is evidence to support a finding that the defendant had reasonable grounds to believe that the force used was reasonably necessary to prevent immediate bodily harm to the defendant. *State v. Stephani*, 369 N.W.2d 540, 546 (Minn. App. 1985).

**CRIMJIG 7.08****ALIBI**

**[The Committee recommends no instruction.]**

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**COMMENT**

An alibi is not a defense. It is proof that a necessary element of the State's case does not exist. The burden of proof is on the State. In keeping with the general position that the instructions should not comment on the effect of particular evidence, the Committee recommends no instruction on alibi. *See State v. Landa*, 642 N.W.2d 720 (Minn. 2002).



**CRIMJIG 7.09****MOTIVE—NOT A DEFENSE**

Intent and motive should not be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement, financial gain, political reasons, religious beliefs, or moral convictions are recognized motives for human conduct. These motives may prompt one person toward voluntary acts of good and another toward voluntary acts of crime.

Good motive alone is not a defense where the act done or omitted is a crime. Thus, the defendant's motive is immaterial, except insofar as you may consider evidence of motive in determining the element of intent.

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**COMMENT**

Ordinarily, this instruction should not be given, but in cases such as trespassing, where claim of right is asserted, or unlawful assembly stemming from a political protest, it may be appropriate to instruct on motive so that the jury does not confuse it with intent. In *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984), the Supreme Court specifically stated that where a defendant is permitted to testify about intent and motive, “[t]he court should . . . instruct the jury to disregard the defendant[’s] subjective motives in determining the issue of intent.”

**CRIMJIG 7.10****PRIMA FACIE EVIDENCE—DEFINED**

[The Committee recommends no instruction.]

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**COMMENT**

In *State v. LaForge*, 347 N.W.2d 247 (Minn. 1984), the Supreme Court invalidated an instruction stating that “you may then find . . . a prima facie case of intent to violate the law . . .” because it created the potential that a reasonable juror could have interpreted the instruction as a mandatory presumption of intent once basic facts were proven, given that the judge did not define “prima facie” and did not state that the presumption need not be rebutted. Furthermore, the phrase “unless you find evidence tending to show lack of such intention” may have impermissibly shifted burden of proof to accused to prove lack of intent and was denial of due process that could not be deemed harmless error. See also *State v. Williams*, 324 N.W.2d 154 (Minn. 1982); *State v. Ferraro*, 290 N.W.2d 177 (Minn. 1980).

## CHAPTER 8

# SENTENCING PROCEEDINGS

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### *Table of Instructions*

#### **CRIMJIG**

- 8.01 Mandatory Minimum—Possession of a Dangerous  
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- Special Verdict Forms

CR8-SVF Aggravating Factors-Verdict Form

## APPENDIX A

### AGGRAVATING FACTORS BEYOND THAT OF PREVIOUS CONVICTION

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#### CRIMJIG 8.01

#### MANDATORY MINIMUM—POSSESSION OF A DANGEROUS WEAPON OR FIREARM

##### Unitary Proceeding

[Insert Element Number] the defendant or an accomplice used, whether by brandishing, displaying, threatening with, or otherwise employing a dangerous weapon [other than a firearm]. A “dangerous weapon” means any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable<sup>1</sup> liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.

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8.01

<sup>1</sup>For definition of combustible or

flammable liquid, see M.S. A. § 609.02, subd. 6.



[Insert Element Number], the defendant or an accomplice (used, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm at the time of the commission of the offense) (or) (possessed a firearm in a manner that substantially increased the risk of violence). A “firearm” is a device designed to be used as a weapon that expels a projectile by the force of any explosion or force of combustion.<sup>2</sup>

[The law recognizes two kinds of possession: “actual possession” and “constructive possession.” A person is in actual possession of \_\_\_\_\_ (a firearm) if (he) (she) has it on (his) (her) person or is exercising direct physical control over \_\_\_\_\_ (the firearm) at a given time. A person is in constructive possession of \_\_\_\_\_ (a firearm) if \_\_\_\_\_ (the firearm) was in a place under (his) (her) exclusive control to which other people did not normally have access, or if found in a place to which others had access, the person knowingly exercised dominion and control over \_\_\_\_\_<sup>3</sup> (the firearm). You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession.

[The law also recognizes that possession may be either exclusive or joint. If one person alone has actual or constructive possession of \_\_\_\_\_ (a firearm), possession is exclusive. If two or more persons share actual or constructive possession of \_\_\_\_\_ (the firearm), possession is joint. You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that defendant had actual or constructive possession of \_\_\_\_\_ (a firearm), whether exclusively or jointly with others.]

In determining whether Defendant possessed a firearm in a manner that substantially increased the risk of violence, you may consider the nature, type and condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its

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<sup>2</sup>See M.S.A. §§ 609.02, subd. 6, and M.S.A. 609.666.

<sup>3</sup>In *State v. Hunter*, \_\_N.W.2d \_\_ (Minn. App 2015) the Court of Appeals indicated that the use of the pronoun

“it” created an ambiguity in the previous version of this instruction. It is recommended the item possessed be particularly identified throughout the instruction.

proximity to the [drugs] [commission of the offense], why the firearm was present, and any other factor that bears upon the risk of violence.

### Bifurcated Proceeding

If you find the defendant guilty of \_\_\_\_\_, you have an additional issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: At the time of the commission of the offense, did the defendant [use, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm] [possess a firearm in a manner that substantially increased the risk of violence]?

[The law recognizes two kinds of possession: "actual possession" and "constructive possession." A person is in actual possession of \_\_\_\_\_ (a firearm) if (he) (she) has it on (his) (her) person or is exercising direct physical control over \_\_\_\_\_ (the firearm) at a given time. A person is in constructive possession of \_\_\_\_\_ (a firearm) if \_\_\_\_\_ (the firearm) was in a place under (his) (her) exclusive control to which other people did not normally have access, or if found in a place to which others had access, the person knowingly exercised dominion and control over \_\_\_\_\_<sup>4</sup> (the firearm). You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession.

[The law also recognizes that possession may be either exclusive or joint. If one person alone has actual or constructive possession of \_\_\_\_\_ (a firearm), possession is exclusive. If two or more persons share actual or constructive possession of \_\_\_\_\_ (the firearm), possession is joint. You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that defendant had actual or constructive possession of \_\_\_\_\_ (a firearm), whether exclusively or jointly with others.]

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<sup>4</sup>In State v. Hunter, \_\_\_N.W.2d \_\_\_ (Minn. App 2015) the Court of Appeals indicated that the use of the pronoun "it" created an ambiguity in the previ-

ous version of this instruction. It is recommended the item possessed be particularly identified throughout the instruction.



In determining whether Defendant possessed a firearm in a manner that substantially increased the risk of violence, you may consider the nature, type and condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its proximity to the [drugs] [commission of the offense], why the firearm was present, and any other factor that bears upon the risk of violence.]

If you find this fact has been proven beyond a reasonable doubt, you should answer "yes." If you find this fact has not been proven beyond a reasonable doubt, you should answer "no."

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COMMENT

M.S.A. § 609.11, subd.5 and subd. 9.

Before the possession of a firearm provisions of M.S.A. § 609.11, subd. 5, may be applied, it must be found, based on all the facts and circumstances, that the defendant possessed a firearm and that doing so increased the risk of violence from the commission of the crime. In *State v. Royster*, 590 N.W.2d 82 (Minn. 1999), the Supreme Court found that the statute applied to both actual and constructive possession, but that mere ownership of a firearm was not sufficient. The court went on to establish the test for determining when constructive possession should trigger the mandatory minimum sentence. The court found it was ". . . reasonable to examine all aspects of the firearm in possession to determine whether it was reasonable to assume that its presence increased the risk of violence and to what degree the risk is increased; the nature, type, and condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its proximity to the drugs, why the firearm was present and whether the nature of the predicate offense is frequently or typically accompanied by use of a firearm, to name a few of the considerations." 590 N.W.2d at 85.



**CRIMJIG 8.02*****BLAKELY PROCEEDINGS*****Unitary Proceeding:**

[If you find the defendant guilty, you shall determine whether (an) (any) additional [aggravating] factor(s) exist(s). (It) (They) will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (is) (are): [Insert aggravating factors in form of questions. See Appendix for aggravating factors.]

**Bifurcated Proceeding:**

[The law provides for a separate proceeding when a defendant has been found guilty of a crime. At this proceeding, you shall consider whether (an) (any) aggravating factor(s) exist(s). (It) (They) will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (is) (are): [Insert factors in form of questions]

Your answers will assist the Court in determining defendant's sentence.

The State has the burden to prove beyond a reasonable doubt the existence of any aggravating factor. In deciding whether the State has met its burden, you may consider all the evidence presented at the trial [and the additional evidence presented at this proceeding]. Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

In order to find the existence of any aggravating factor, you (the jury) must unanimously agree that it has been proven beyond a reasonable doubt. You will be asked (a) (some) question(s) regarding the existence of (an) aggravating factor(s) on a special verdict form. If you find that an aggravating factor has been proven beyond a reasonable doubt, then you shall answer

“yes” to that question on the verdict form. If you find that an aggravating factor has not been proven beyond a reasonable doubt, then you shall answer the question “no” on the verdict form.

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#### COMMENT

The criminal jury instructions in Chapter 8 are based upon the United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), which held that the “statutory maximum” under the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

Applying the principles announced in *Blakely*, the Supreme Court in *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005) severed, as unconstitutional, those portions of Minnesota’s Sentencing Guidelines that required a judicial finding on aggravating factors justifying an upward departure and held that only those facts found by the jury could be used to justify an upward departure. The procedures outlined here are designed to serve as a guideline for eliciting such aggravating factors as may apply. The Legislature has adopted a series of *Blakely* procedures in M.S.A. § 244.10. Those provisions are scheduled to sunset on February 1, 2007.

The presumptive sentence prescribed by the Minnesota Sentencing Guidelines is the maximum sentence that the district court may impose based solely on facts found by the jury or admitted by the defendant. In *State v. Hagen*, 690 N.W.2d 155 (Minn. App. 2004), the Court of Appeals held that an upward departure could not be based upon an “admission” to an aggravating factor unless it is accompanied by the defendant’s waiver of the right to a jury trial on the record, either orally or in writing, on the aggravating factor. See *State v. Whitley*, 682 N.W.2d 691 (Minn. App. 2004).

In *State v. Allen*, 706 N.W.2d 40 (Minn. 2005), the Supreme Court held that upward dispositional departure executing a presumptive stayed sentence under Minnesota Sentencing Guidelines, based on judicially found fact that defendant was unamenable to probation, violated defendant’s Sixth Amendment right to jury trial under *Blakely*. Finding sufficient significant differences between an executed and a stayed sentence, the Court held that unamenability to probation was a question of fact to be resolved by a jury, regardless of whether it was an offender-based or offense-based factor.



**SPECIAL VERDICT FORMS****CR8-SVF****AGGRAVATING FACTORS-VERDICT FORM**

**[Insert appropriate aggravating factor question]**

**These are for example only. *See also* CRIMJIG 12.110 for factors relating to criminal sexual conduct.**

**Particularly Vulnerable—Sentencing Guidelines II.D.103.2.b(1) *See also* Particular Vulnerability in Blakely Proceedings Appendix A on how to proceed when an aggravated sentence for particular vulnerability is sought.)**

- 1. Vulnerability due to age or other condition: (1) What was the (age) (infirmity) (reduced mental or physical incapacity) of the victim? (2) Because of the victim's (age) (infirmity) (reduced mental or physical incapacity) was [(he) (she)] [(unable to fight back against) (unable to flee) (unable to seek help against)] the defendant?**
- 1a. Vulnerability due to the presence of children: (Was a (child) (vulnerable adult))(Were children) present in the home? Did the presence of (a child) (children) (a vulnerable adult) prevent the victim from [(fighting back against) (fleeing) (seeking help against)] the defendant?**
- 2. Did the defendant know or should the defendant have known that (the victim) (\_\_\_\_\_) (was) (had) (condition)?**

**\_\_\_\_Yes**

**\_\_\_\_No**

- 3. [Was (the victim) (\_\_\_\_\_) injured?**



☐ Yes☐ No

4. Did the defendant have a prior conviction for a Criminal Sexual Conduct Offense or another offense in which (the victim) (\_\_\_\_\_) was otherwise injured?]

☐ Yes☐ No

**Particular Cruelty—Sentencing Guidelines II.D.103.2.b(2)** (See *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009) and the discussion on Particular Cruelty in Blakely Proceedings Appendix A on how to proceed when an aggravated sentence for particular cruelty is sought.)

**N.B.** The following questions are exemplars only. The questions must be drafted to circumstances of the particular case.

**Zone of Privacy:** Did the defendant invade the [note that this must be specific as it relates to the crime charged] (home and area immediately surrounding the home) (apartment) (dwelling) (bedroom)] of the victim?

☐ Yes☐ No

**Gratuitous Infliction of Injury** Did the defendant inflict more injury than necessary to commit the crime? Did the defendant inflict injury after having completed the crime? Did the defendant torture the victim during the crime?

☐ Yes☐ No

**Failure to release in a safe place:** A series of questions will be necessary to demonstrate that the place where the victim was released was not safe ("safe place" is conclusory). E.g., were there homes close by? Was the area lighted? Was the victim (properly clothed) for the weather? For walking?

\_\_\_\_Yes

\_\_\_\_No

**Failure to seek medical attention:** Did the defendant fail to seek medical attention for the victim?

\_\_\_\_Yes

\_\_\_\_No

**Presence of children:** Was the offense committed in the actual presence of (a child) (children)?

\_\_\_\_Yes

\_\_\_\_No

**Presence of children: Discovery of body:** Did the defendant leave the body of the victim intending that it be discovered by (a child) (the children) of the victim?

\_\_\_\_Yes

\_\_\_\_No

**Psychological Damage:** Did the defendant inflict (severe) (lasting) psychological damage upon the victim?

\_\_\_\_Yes

\_\_\_\_No

**Concealment of the body:** Did the defendant conceal the victim's body? (Concealment is considered cruel given the impact on the victim's family. (State v.

Hicks 837 N.W.2d 51 (Minn. App. 2013) and cases cited therein.)

[Other relevant factors which may be drawn from case law.]

If you answered “yes” to the previous question, then answer this question: Should the defendant be held responsible for the way in which (the victim) (\_\_\_\_\_) was treated?

[Insert CRIMJIG 4.01 if another person actually committed the acts.]

### Use or Possession of a Dangerous Weapon or Firearm

#### M.S.A. § 609.11

1. Did the defendant (or an accomplice) use a dangerous weapon other than a firearm at the time of the offense?

\_\_\_\_Yes

\_\_\_\_No

2. Did the defendant (or an accomplice) possess or use (by brandishing, displaying, threatening with, or otherwise employing) a firearm at the time of the offense?

\_\_\_\_Yes

\_\_\_\_No

3. Did the defendant have a prior conviction in which defendant (or an accomplice) [used a (firearm) (dangerous weapon)] [possessed a firearm]?

\_\_\_\_Yes

\_\_\_\_No



## APPENDIX A

AGGRAVATING FACTORS BEYOND THAT  
OF PREVIOUS CONVICTION

Pursuant to Minnesota Rules of Criminal Procedure Rule 11.04, a hearing should be held when the prosecutor has given notice under Rule 7.03 or Rule 19.04, subd. 6(3), of intent to seek an aggravated sentence. The purpose of the hearing is to determine whether the law and evidence will support an aggravated sentence. Although many of the aggravating factors allow for a quantitative evaluation of the evidence (number of victims, amount of money involved, number and nature of prior convictions, etc.) some, such as “particular vulnerability” or “particular cruelty” require an experiential and contextual analysis that the jury will not have. This puts the judge in the role of acting as the initial gatekeeper for resolving the questions of “particular vulnerability” or “particular cruelty,” bringing his or her experience of similar crimes to the “particular” part of the question. As part of the Omnibus Hearing, the prosecution should be prepared to make an offer of proof that the case will be one that warrants a particular vulnerability or particular cruelty instruction. If the judge does not feel that the case will warrant such an instruction, the judge should indicate his or her intention not to submit the issue to the jury. If the judge does feel that the case will warrant such an instruction, the prosecution must be prepared to elicit testimony that will address the *Rourke* factual questions (See *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009)) in the instructions that are required to prove to the jury that the manner in which the crime was carried out was significantly more serious than that typically involved in the commission of the crime and that give the judge the reason for an upward departure.

. . . a district court must submit to a jury the question of whether the State has proven beyond a reasonable doubt the existence of additional facts, which were neither admitted by the defendant, nor necessary to prove the elements of the offense, but which support reasons for departure. But the question of whether those additional facts provide the district court a reason to depart does not involve a factual determination and, therefore, need not be submitted to a jury.

*Id.* at 921

“The general issue that faces the sentencing court in deciding whether to depart durationally is whether defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question. In making this determination, the court may not consider evidence that points to the defendant’s guilt of some other offense but that does not support conclusion that the defendant committed the offense in question in a particularly serious

way. On the other hand, generally it is proper for the sentencing court to consider the course of conduct underlying the charge for which the defendant is being sentenced.” *State v. Cox*, 343 N.W.2d 641 (Minn. 1984). The standard for departure requires that the aggravating factors be “substantial and compelling.” *State v. Griller*, 583 N.W.2d 736 at 744 (Minn. 1998).

In close cases, the judge can leave the question open for ruling until after he or she has heard the evidence. It should be noted, however, that elements of the crime of which the defendant was charged may not be used to enhance, nor may uncharged conduct be used. *State v. Jackson*, 749 NW2d 353 (2008).

### Minnesota Sentencing Guidelines II.D.2.b—Aggravating Factors

2. Factors that may be used as reasons for departure: The following is a nonexclusive list of factors which may be used as reasons for departure:

\* \* \*

#### b. Aggravating Factors:

The victim was **particularly vulnerable** due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender. (Emphasis added.) The Supreme Court has also recognized that the victim may be particularly vulnerable due to a child’s presence in the home. *State v. Johnson*, 450 N.W.2d 134 (Minn. 1990) (babysitter was particularly vulnerable due to the fact she was babysitting two infants and could not flee because of responsibility to the infants present). See also *State v. Hart*, 477 N.W.2d 732 (Minn. App. 1991) (the fact that the victim’s children were asleep in the next room increased the victim’s vulnerability and compromised victim’s ability to escape). The Committee feels the reasoning would extend to the presence of a vulnerable adult in the home as well.

### Determining “Particular Vulnerability”

The questions must be drafted to the particular case. In *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009) the Supreme Court directed that the questions for the jury not address the reasons for departure (i.e., particular vulnerability) but the facts underlying those reasons (i.e., age, infirmity, or reduced capacity). Although *Rourke* involved questions relating to particular cruelty, the holding has been applied to questions relating to particular vulnerability” in *Carse v. State*, 778 N.W.2d 361 (Minn. App. 2010) and *State v. Mohamed*, 779, N.W.2d 93 (Minn. App. 2010). In most cases, it would appear three factual questions would be necessary



to adduce “particular vulnerability.” These would take the general form of: (1) what was the condition of the victim; (2) did the victim’s condition “impair the victim’s ability to seek help, fight back or escape harm” (*Mohamed* at 98); and (3) did the defendant know or should have known of these facts. As an example: Was the victim handicapped in movement? Did the victim’s handicap prevent her from escaping from defendant? Did the defendant know or should the defendant have known the victim was handicapped in movement? (See *State v. Rodriguez*, 505 N.W.2d 373, 377 (Minn. App. 1993)).

Or again: Was the victim intoxicated? Did the victim’s intoxication prevent her from fighting back? Did the defendant know or should the defendant have known the victim was intoxicated? (See *State v. Gettel*, 404 N.W.2d 902, 904 (Minn. App. 1987)).

Or again: Was the victim caring for young children? Did the victim’s responsibility for the children prevent her from escaping? Did the defendant know or should the defendant have known the victim was caring for young children? (See *State v. Johnson*, 450 N.W.2d 134 (Minn. 1990); *State v. Dalsen*, 444 N.W.2d 582, 583 (Minn. App. 1989)).

Note, however, that in the case of an extremely young child (a child under the age of four), there may be, depending upon the charge, only two questions: What was the age of the victim? Did the defendant know or should the defendant have known the age of the victim? (See *State v. Mohamed*, 779 N.W.2d 93, 99 (Minn. App. 2010)).

Because the Sentencing Guidelines have provided some outline of the possible factors, as a general rule questions involving particular vulnerability, do not pose the “gateway” difficulties that questions relating to particular cruelty do (see “Determining ‘Particular Cruelty’” below). However, the court must be careful, in drafting the questions, to avoid redundancy in the sentencing elements. Specifically, the court must make “(1) a factual finding that there exist one or more circumstances not reflected [in the guilty plea or facts which are elements of the offense or that support uncharged conduct or dismissed charges or other charges of which the defendant is acquitted or convicted or elements of a greater crime when defendant is convicted of a lesser-included offense] and (2) an explanation by the district court as to why those circumstances create a substantial and compelling reason to impose a sentence outside the range on the grid.” *Rourke* at 919. The additional language in the brackets is based upon the holdings in *State v. Jackson*; 749 N.W.2d 353 (Minn. 2008); *State v. Simon* 520 N.W. 2d 393 (Minn. 1994). Questions are to be as fact-based as



possible. Conclusory questions and ultimate questions of fact are to be avoided.

(2) The victim was treated with **particular cruelty** for which the individual offender should be held responsible. (Emphasis added.)

### Determining “Particular Cruelty”

In *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009), the Supreme Court held that an upward departure may be imposed only when there is: “(1) a factual finding that there exist one or more circumstances not reflected [in the guilty plea or facts which are elements of the offense or that support uncharged conduct or dismissed charges or other charges of which the defendant is acquitted or convicted or elements of a greater crime when defendant is convicted of a lesser-included offense] and (2) an explanation by the district court as to why those circumstances create a substantial and compelling reason to impose a sentence outside the range on the grid.” *Rourke* at 919. The additional language in the brackets is based upon the holdings in *State v. Jackson*; 749 N.W.2d 353 (Minn. 2008); *State v. Simon* 520 N.W.2d 393 (Minn. 1994). the court must be careful, in drafting the questions, to avoid redundancy in the sentencing elements. Questions are to be as fact-based as possible. Conclusory questions and ultimate questions of fact are to be avoided.

Although redundancy limitations remove several facts from consideration (a factual finding that there exist one or more circumstances not reflected in the guilty plea or facts which are elements of the offense or that support uncharged conduct or dismissed charges or other charges of which the defendant is acquitted or convicted or elements of a greater crime when defendant is convicted of a lesser-included offense) there are still many facts which would support the court finding a reason to depart based upon particular cruelty. Although some are listed on the recommended sentencing verdict form, the Committee does not regard the list as exhaustive and can only recommend that further research be done to support any particular cruelty question. The Committee does note that a finding of particular cruelty due to the presence of children requires that the offense be committed in the actual presence of the children (*State v. Profit*, 323 N.W.2d 34 (Minn. 1982)) or that the children saw, heard or otherwise witnessed the offense (*State v. Vance*, 765 N.W.2d 390 (Minn. 2009)). Presence of the children in the home might support a finding of particular vulnerability of the victim is unable to flee due to responsibilities to the children. The holding in *State v. Vance*, *id.* at 393, indicates that the questions of vulnerability due to presence of children and cruelty due to commission in actual presence of children must be separate questions.

(3) The current conviction is for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured and there is a **prior felony conviction** for a Criminal Sexual Conduct offense or **an offense in which the victim was otherwise injured**. (Emphasis added.)

(4) The offense was a **major economic offense**, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The **presence of two or more of the circumstances listed below** are aggravating factors with respect to the offense:

(a) the offense involved multiple victims or multiple incidents per victim;

(b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;

(c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;

(d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or

(e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

(Emphasis added.)

(5) The offense was a **major controlled substance offense**, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The **presence of two or more of the circumstances** listed below are aggravating factors with respect to the offense:

(a) the offense involved at least three separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so; or

(b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or



(c) the offense involved the manufacture of controlled substances for use by other parties; or

(d) the offender knowingly possessed a firearm during the commission of the offense; or

(e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy; or

(f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or

(g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional).

(Emphasis added.)

(6) The offender committed, **for hire, a crime against the person.** (Emphasis added.)

(7) Offender is a **“patterned sex offender”** (see Minn.Stat. § 609.108). (Emphasis added.)

(8) Offender is a **“dangerous offender who commits a third violent crime”** (see Minn.Stat. § 609.1095, subd. 2). (Emphasis added.)

(9) Offender is a **“career offender”** (see Minn.Stat. § 609.1095, subd. 4). (Emphasis added.)

“The career-offender statute provides that, when a judge is imposing an executed sentence, and execution is the presumptive disposition, the factfinder may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence” after finding (1) five or more prior felony convictions and (2) a “pattern of criminal conduct.” A “pattern of criminal conduct” refers to “acts related to one another through a common scheme or plan or shared criminal purpose.” *State v. Gorman*, 546 N.W.2d 5, 9 (Minn.1996) (quoting Minn. Stat. § 609.902, subd. 6(3)(i) (1994), Minnesota Racketeer Influenced and Corrupt Organizations (RICO) statute). The pattern may be shown by “proof of criminal conduct similar, but not identical, in motive, purpose, results, participants, victims or other shared characteristics.” *Id.*

Determining whether a conviction is part of a “pattern of criminal conduct” involves a comparison of different criminal acts, weighing the degree to which those acts are sufficiently similar with respect to any of the characteristics listed in *Gorman*.



\* \* \* The bare fact of a prior conviction, however, does not establish the motive behind the crime, its purpose, results, participants, or victims.”

*State v. Mitchell*, 687 N.W.2d 393 (Minn. App. 2004)

(10) The offender committed the crime as **part of a group of three or more persons** who all actively participated in the crime. (Emphasis added.)

(11) The offender **intentionally selects the victim** or the property against which the offense is committed, in whole or in part, because of the victim’s, the property owner’s or another’s **actual or perceived race, color, religion, sex, sexual orientation, disability, age or national origin**. (Emphasis added.)

(12) The offender’s **use of another’s identity without authorization to commit a crime**. This aggravating factor may not be used when the use of another’s identity is an element of the offense. (Emphasis added.)

#### Statutory Aggravating Factors:

**609.106, subd. 1(3) Heinous Crimes.** Among other convictions, conviction of M.S. 609.342, .343 or .344 requires additional finding that **the offense underlying prior conviction was committed with force or violence**. See *State v. Leake*, 699 N.W.2d 312 (Minn. 2005).

#### FOR INSTRUCTIONS ON HEINOUS CRIMES FOR CRIMINAL SEXUAL CONDUCT, SEE CRIMJIG 12.110

**609.108 Patterned and Predatory Sex Offenders.** Conviction of listed offense or attempt to commit and additional findings of danger to public safety and in need of long-term treatment or supervision.

**THE FACTFINDER MUST DETERMINE THAT THE OFFENDER IS A DANGER TO PUBLIC SAFETY (SEE FACTORS IN M.S.A. § 609.108, subd. 4) AND THAT THE OFFENDER’S CRIMINAL SEXUAL BEHAVIOR IS SO ENGRAINED THAT THE RISK OF REOFFENDING IS GREAT WITHOUT INTENSIVE PSYCHOTHERAPEUTIC INTERVENTION OR OTHER LONG-TERM TREATMENT OR SUPERVISION EXTENDING BEYOND THE PRESUMPTIVE TERM OF IMPRISONMENT AND SUPERVISED RELEASE. (M.S.A. 609.108, subd. 1). SEE STATE V. BOEHL, 697 N.W.2D 215 (MINN. APP. 2005).**

**609.109, subd 4 Repeat Sex Offender. Mandatory 30-year term.** Conviction of listed offense, prior conviction and finding of an aggravating factor.

**609.1095, subd. 2 Dangerous Offender.** Conviction of violent crime, two or more prior convictions for violent crimes and additional finding that offender is danger to public safety.

THE FACTFINDER MAY BASE ITS DETERMINATION THAT THE OFFENDER IS A DANGER TO PUBLIC SAFETY ON THE FOLLOWING FACTORS: (I) THE OFFENDER'S PAST CRIMINAL BEHAVIOR, SUCH AS THE OFFENDER'S HIGH FREQUENCY RATE OF CRIMINAL ACTIVITY OR JUVENILE ADJUDICATIONS, OR LONG INVOLVEMENT IN CRIMINAL ACTIVITY INCLUDING JUVENILE ADJUDICATIONS; OR (II) THE FACT THAT THE PRESENT OFFENSE OF CONVICTION INVOLVED AN AGGRAVATING FACTOR THAT WOULD JUSTIFY A DURATIONAL DEPARTURE UNDER THE SENTENCING GUIDELINES. M.S.A. 609.1095, subd.2(2)

**609.1095, subd. 4 Career Offender.** Five or more felony convictions and additional finding that present offense was committed as part of a pattern of criminal conduct.

“THE CAREER-OFFENDER STATUTE PROVIDES THAT, WHEN A JUDGE IS IMPOSING AN EXECUTED SENTENCE, AND EXECUTION IS THE PRESUMPTIVE DISPOSITION, THE JUDGE MAY IMPOSE AN AGGRAVATED DURATIONAL DEPARTURE FROM THE PRESUMPTIVE SENTENCE UP TO THE STATUTORY MAXIMUM SENTENCE” AFTER FINDING (1) FIVE OR MORE PRIOR FELONY CONVICTIONS AND (2) A “PATTERN OF CRIMINAL CONDUCT.” A “PATTERN OF CRIMINAL CONDUCT” REFERS TO “ACTS RELATED TO ONE ANOTHER THROUGH A COMMON SCHEME OR PLAN OR SHARED CRIMINAL PURPOSE.” *STATE V. GORMAN*, 546 N.W.2D 5, 9 (MINN.1996) (QUOTING Minn. Stat. § 609.902, subd. 6(3)(i) (1994), MINNESOTA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) STATUTE). THE PATTERN MAY BE SHOWN BY “PROOF OF CRIMINAL CONDUCT SIMILAR, BUT NOT IDENTICAL, IN MOTIVE, PURPOSE, RESULTS, PARTICIPANTS, VICTIMS OR OTHER SHARED CHARACTERISTICS.” *ID.*

DETERMINING WHETHER A CONVICTION IS PART OF A “PATTERN OF CRIMINAL CONDUCT” INVOLVES A COMPARISON OF DIFFERENT CRIMINAL ACTS, WEIGHING THE DEGREE TO WHICH THOSE ACTS ARE SUFFICIENTLY SIMILAR WITH RESPECT



**TO ANY OF THE CHARACTERISTICS LISTED IN GORMAN.**

**\* \* \* THE BARE FACT OF A PRIOR CONVICTION, HOWEVER, DOES NOT ESTABLISH THE MOTIVE BEHIND THE CRIME, ITS PURPOSE, RESULTS, PARTICIPANTS, OR VICTIMS.”**

**STATE V. MITCHELL, 687 N.W.2D 393 (MINN. APP. 2004)**

**609.11, subd. 4 Dangerous weapon other than a firearm.** Applicable offense (M.S. 609.11, subd. 9) and additional finding that defendant **or accomplice** (emphasis added) brandished, displayed, threatened with or other employed a dangerous weapon other than a firearm.

**609.11, subd. 5 Firearm.** Applicable offense (M.S. 609.11, subd. 9) and additional finding that defendant **or accomplice** (emphasis added) had in possession, or used, whether by brandishing, displaying, threatening with or otherwise employing, a firearm.

**609.26, subd. 6(2) Depriving Another of Custodial or Parental Rights.** Additional findings may include: (i) offense committed while possessing dangerous weapon or causing substantial bodily harm to effect taking; (ii) child abused or neglected during concealment, detention or removal; (iii) infliction or threat to inflict physical harm on parent, lawful custodian, or child with intent to cause parent or lawful custodian to discontinue criminal prosecution; (iv) demand of payment in exchange for return of child or demand to be relieved of legal obligation to support in return of child.

### **Unamenability to Probation**

In *State v. Allen*, 706 N.W.2d 40 (Minn. 2005), the Supreme Court held that an upward dispositional departure executing a presumptive stayed sentence under Minnesota Sentencing Guidelines, based on a judicially found fact that defendant was unamenable to probation, violated defendant’s Sixth Amendment right to jury trial under *Blakely*. Finding sufficient significant differences between an executed and a stayed sentence, the Court held that unamenability to probation was a question of fact to be resolved by a jury, regardless of whether it was an offender-based or offense-based factor.

In attempting to provide some guidance on this issue, the Committee has prepared a list of factors for consideration by the jury. While it has examined a number of amenability to probation cases, it has focused primarily on two cases: the Court of Appeals discus-



sion of unamenability in *State v. Allen*, 2004 WL 1925881 (Unpub. Op. Minn. App. Aug. 31, 2004), *rev'd on other grnds*, *State v. Allen*, 706 N.W.2d 40 (Minn. 2005) and *State v. Trog*, 323 N.W.2d 28 (Minn. 1981) (defendant was particularly amenable to probation). This list is to be regarded as neither exhaustive nor exclusive. Until the matter is further resolved, the court should remain open to arguments of counsel regarding factors to be considered in determining whether a particular defendant is or is not amendable to probation. From the *Allen* case it is apparent the form of the question is to be whether or not the defendant is unamenable to probation. The Committee recommends the following:

**HAVING FOUND THE DEFENDANT GUILTY, YOU HAVE AN ADDITIONAL ISSUE TO CONSIDER. IT WILL BE PUT TO YOU IN THE FORM OF A QUESTION. THE QUESTION IS: "IS THE DEFENDANT UNAMENABLE TO PROBATION?" "PROBATION" MEANS A COURT-ORDERED SANCTION IMPOSED UPON AN OFFENDER FOR A PERIOD OF SUPERVISION. IT IS IMPOSED AS AN ALTERNATIVE TO CONFINEMENT OR IN CONJUNCTION WITH CONFINEMENT OR INTERMEDIATE SANCTIONS. A PERSON IS "UNAMENABLE TO PROBATION" WHEN (HE) (SHE) CANNOT ACCEPT THE STRUCTURE, CONDITIONS, AND LIMITATIONS THAT ARE NORMALLY PLACED UPON A PROBATIONER DURING THE PERIOD OF SUPERVISION, INCLUDING BEING LAW-ABIDING. YOU WILL ANSWER THE QUESTION "YES" OR "NO." IF YOU HAVE A REASONABLE DOUBT AS TO THE ANSWER, YOUR ANSWER TO THE QUESTION WILL BE "NO."**

**YOU (THE JURY) MAY CONSIDER THE FOLLOWING QUESTIONS TO HELP YOU DETERMINE WHETHER THE DEFENDANT IS UNAMENABLE TO PROBATION:**

1. [Does the defendant have a prior criminal history or is this defendant's first (serious) offense?]
2. [Does the defendant have a history of chemical or alcohol abuse? Does the defendant minimize (his) (her) use of drugs or alcohol? Has he refused to participate in programs to eliminate (his) (her) need for drugs or alcohol?]
3. [Does the defendant have the strong support of friends and family?]
4. [Has the defendant expressed sincere remorse for the of-

fense and the effect it has had upon other or has he failed to take responsibility for his actions, blaming them on others?]

5. [Did the defendant cooperate with the authorities?]
6. [Does the defendant have a prior history of probation violations?]
7. [Does the defendant pose a high risk to public safety?]
8. [Will the defendant and the community benefit from having the defendant admitted to probation rather than being imprisoned?]

## PART II. SPECIFIC CRIMES

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### A. CRIMES AGAINST THE PERSON

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#### CHAPTER 11

#### HOMICIDE

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**CRIMJIG 11.01**

**MURDER IN THE FIRST DEGREE—  
PREMEDITATION—DEFINED**

Under Minnesota law, a person causing the death of another person with premeditation and with the intent (to effect the death of) (to kill) the person (or another) is guilty of the crime of murder in the first degree.

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**COMMENT**

M.S.A. § 609.185(a)(1).

If evidence is introduced by either party that raises the question whether the killing may have occurred in the heat of passion, reducing the crime to manslaughter in the first degree, CRIMJIG 11.04, should be read with this instruction, and the elements should be read as in CRIMJIG 11.05. *State v. Mitchell*, 282 Minn. 113, 163 N.W.2d 310 (1968).



**CRIMJIG 11.02****MURDER IN THE FIRST DEGREE—  
PREMEDITATION—ELEMENTS**

The elements of murder in the first degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant acted with the intent (to effect the death of) (to kill) \_\_\_\_ (or \_\_\_\_ ) (or another person). To find the defendant had the "intent to (effect the death of a person) (to kill)," you must find the defendant acted with the purpose of causing death, or believed the act would have that result.

Fourth, the defendant acted with premeditation. "Premeditation" means the defendant considered, planned, prepared for, or determined to commit the act before the defendant committed it. Premeditation, being a process of the mind, is wholly subjective and hence not always susceptible to proof by direct evidence. It may be inferred from all the circumstances surrounding the event. It is not necessary for premeditation to exist for a specific length of time. While premeditation requires no specific period of time for deliberation, some amount of time must pass between the formation of the intent and the carrying out of the act. A premeditated decision to kill may be reached in a short period of time. However, an unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated.

[If the defendant acted with premeditation and with the intent to cause the death of \_\_\_\_ (a person other than the deceased), the elements of premeditation and intent to kill are satisfied and may be transferred to another victim, even if the defendant did not intend to the other person.<sup>1</sup> This concept is known as "transferred intent."]

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11.02

charged.

<sup>1</sup>The person whose killing is

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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#### COMMENT

M.S.A. § 609.18 (premeditation defined); M.S.A. § 609.185 (murder in the first degree); M.S.A. § 609.19 (murder in the second degree).

The portion of the instruction defining premeditation was approved in *State v. Martin*, 261 N.W.2d 341 (Minn.1977). In *State v. Flores*, 418 N.W.2d 150 (Minn. 1988), the Supreme Court rejected a claim that a jury instruction concerning premeditation based upon CRIMJIG 11.02 improperly instructed the jury on that element of the offense.

For the definition of premeditation, see *State v. Buntrock*, 560 N.W.2d 383 (1997), citing *State v. Lloyd*, 345 N.W.2d 240 (1984); *State v. Hyleck*, 286 Minn. 126, 175 N.W.2d 163 (1970), *cert. denied*, 399 U.S. 932, 90 S. Ct. 2267, 26 L.Ed.2d 803 (1970); *State v. Campbell*, 281 Minn. 1, 161 N.W.2d 47 (1968); *State v. Ware*, 267 Minn. 191, 126 N.W.2d 429 (1964); *State v. Gavle*, 234 Minn. 186, 48 N.W.2d 44 (1951).

See *State v. McArthur*, 730 N.W. 2d 44 (Minn. 2007), a case which seemingly involves a random victim. The Supreme Court found that, although no motive could be shown for the killing, the evidence of planning activity and the manner of killing were sufficient to support a jury finding of premeditation. The court relied on *State v. Moua*, 678, N.W.2d 29 (Minn. 2004) in its analysis to determine whether the evidence of premeditation was sufficient.

In *State v. Leake*, 699 N.W.2d 312 (Minn. 2005), the Supreme Court required that the State prove that, after the defendant formed the intent to kill, some appreciable time passed during which the defendant considered, planned, prepared or determined to commit the act. In *State v. Moore*, 481 N.W.2d 355 (Minn. 1992), the Supreme Court stated that while premeditation requires no specific period of time for deliberation, some amount of time must pass between the formation of the intent and the carrying out of the act. The court stated that its holding in *State v. Neumann*, 262 N.W.2d 426 (Minn. 1978), that premeditation may occur "virtually instantaneously" with the formation of intent to kill, blurs the distinction between first and second degree murder. In determining whether or not the evidence supports the findings of premeditation, the evidence should be looked at as a whole, and a finding of premeditation may be supported even though no single piece of evidence standing alone would be sufficient.



The Supreme Court held, in *State v. Goodloe*, 718 N.W. 2d 413 (Minn. 2006), that the phrase “a short period of time” was equivalent to “some appreciable time” and this instruction accurately states the law. See *State v. Moore*, 846 N.W.2d 83 (Minn. 2014); *State v. Anderson*, 789 N.W.2d 227 (Minn. 2010). Based upon the language in the dissent of Justices Anderson and Page in *Anderson*, the phrase “any specific length of time” was changed to “a specific length of time.”

Murder in the second degree should almost always be charged as a lesser included offense to murder in the first degree. Under the decision in *State v. Hyleck*, *supra*, it seems there are few cases in which murder in the second degree is not a lesser-included offense. When the killing is alleged to have been done by another at the instigation of the defendant, it is possible that only a charge of murder in the first degree would be appropriate. See *State v. Thompson*, 273 Minn. 1, 139 N.W.2d 490 (1966), *cert. denied*, 385 U.S. 817, 87 S. Ct. 39, 17 L.Ed.2d 56 (1966).

In *State v. Brom*, 463 N.W.2d 758 (Minn. 1990), *cert. denied*, 499 U.S. 940, 111 S. Ct. 1398, 113 L.Ed.2d 453 (1991), the Supreme Court reaffirmed its holding in *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982) that expert psychiatric testimony was inadmissible in the first portion of a bifurcated trial with respect to the elements of premeditation and intent.



## CRIMJIG 11.03

MURDER IN THE FIRST DEGREE—  
PREMEDITATION—TRANSFERRED INTENT

If the defendant acted with premeditation and with the intent to cause the death of \_\_\_\_ (a person other than the deceased), the elements of premeditation and intent to kill are satisfied and may be transferred to another victim, even if the defendant did not intend to (effect the death of) (kill) the other person.<sup>1</sup> This concept is known as “transferred intent.”<sup>2</sup>

## COMMENT

M.S.A. § 609.18; M.S.A. § 609.185(a)(1).

CRIMJIG 11.03 is intended to be used to with CRIMJIG 11.02.

For a discussion of the doctrine of transferred intent, as applied to premeditated murder, as well as a review of cases, see *State v. Hall*, 722 N.W.2d 472 (Minn. 2006) (instruction impermissibly relieved state of burden of proof where victim was intended victim). Premeditation will transfer with intent if the perpetrator premeditated the murder of an intended victim but accidentally killed an unintended victim. *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). See also *State v. Bakdash*, 830 N.W.2d 906 (Minn. App. 2013).

In *State v. Gowdy*, 262 Minn. 70, 113 N.W.2d 578 (1962), the Supreme Court held: “It is not necessary that [the defendant] have a premeditated design to effect the death of a specific person. It is enough that he had a premeditated design to kill, if necessary, anyone who interfered with his plan to rob the store or to escape capture.” See *State v. McArthur*, 730 N.W. 2d 44 (Minn. 2007), a case which seemingly involves a random victim, the Supreme Court found that, although no motive could be shown for the killing, the evidence of planning activity and the manner of killing were sufficient to support a jury finding of premeditation. The court relied on *State v. Moua*, 678, N.W.2d 29 (Minn. 2004) in its analysis to determine whether the evidence of premeditation was sufficient.

In *State v. Livingston*, 420 N.W.2d 223 (Minn. App. 1988), the Court of Appeals rejected the claim that an instruction on transferred intent unconstitutionally relieved the State of its burden to prove the element of specific intent beyond a reasonable doubt.

## 11.03

<sup>1</sup>The person whose killing is charged.

<sup>2</sup>The transferred intent instruction should be given in any homicide case where the facts would permit.

In *State v. Sutherlin*, 396 N.W.2d 238 (Minn.1986), the Supreme Court held that no plain error was committed when the trial court gave a “transferred intent” instruction based upon CRIMJIG 11.02 and 11.03.

**CRIMJIG 11.04****MURDER IN THE FIRST DEGREE—MURDER AND  
MANSLAUGHTER DISTINGUISHED—HEAT OF  
PASSION**

Under Minnesota law, a person intentionally causing the death of another person while acting in the heat of passion is guilty of manslaughter in the first degree, rather than murder. "Heat of passion" is provoked by such words or acts of another person that would provoke a person of ordinary self-control in like circumstances. [But the crying of a child can never be adequate provocation to cause heat of passion resulting in the death of the child.]

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**COMMENT**

M.S.A. § 609.20(1).

This instruction is designed to be read with the definition of murder in the first degree (CRIMJIG 11.01) in cases in which the issue of heat of passion is raised.

In *State v. Fulford*, 290 Minn. 236, 187 N.W.2d 270 (1971), the Court of Appeals held that submission of a "heat of passion" manslaughter instruction was not appropriate where evidence supported finding of intentional unpremeditated second-degree murder and where defendant's own testimony was that decedent was stabbed as a result of his accidentally falling on the knife. Hot blood is not complete excuse for killing of another but is an extenuating circumstance which court considers in fixing measure of guilt and consequent punishment for it, and it is emotional status of defendant which is of primary importance in determining whether homicide is murder or manslaughter in first degree. *State v. Boyce*, 284 Minn. 242, 170 N.W.2d 104 (1969).



**CRIMJIG 11.05****MURDER IN THE FIRST DEGREE—  
PREMEDITATION—ISSUE OF HEAT OF PASSION—  
ELEMENTS**

The elements of murder in the first degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant acted with the intent (to effect the death of) (to kill) \_\_\_\_ (or \_\_\_\_ ) (or another person). To find the defendant had the "intent to kill," you must find the defendant acted with the purpose of causing death, or believed the act would have that result.

Fourth, the defendant acted with premeditation. "Premeditation" means the defendant considered, planned, prepared for, or determined to commit the act before the defendant committed it. Premeditation, being a process of the mind, is wholly subjective and hence not always susceptible to proof by direct evidence. It may be inferred from all the circumstances surrounding the event. It is not necessary for premeditation to exist for a specific length of time. While premeditation requires no specific period of time for deliberation, some amount of time must pass between the formation of the intent and the carrying out of the act. A premeditated decision to kill may be reached in a short period of time. However, an unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated.

Fifth, the defendant did not act in the "heat of passion" provoked by such words or acts as would provoke a person of ordinary self-control in like circumstances. Even if the defendant acted with premeditation and with the intent to kill \_\_\_\_, (or \_\_\_\_ ) (or another person), if the defendant acted in the heat of passion, the defendant is not guilty of murder in the first degree. However, such heat of passion is not a complete defense for the killing of another person. The heat of passion may cloud the defendant's reason and weaken willpower, and this is a circum-

stance the law considers in fixing the degree of guilt. If the heat of passion is provoked by words or acts that would provoke a person of ordinary self-control in the same circumstances, an intentional killing is reduced to manslaughter in the first degree. [But the crying of a child can never be adequate provocation to cause heat of passion resulting in the death of the child.] The State has the burden to prove beyond a reasonable doubt the defendant did not act in the heat of passion.

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge.

If you have a reasonable doubt there was premeditation, but you find each of the other elements has been proven beyond a reasonable doubt, the defendant is guilty of murder in the second degree. The crime of murder in the second degree differs from murder in the first degree only in that the killing was done with intent to kill a person, but not with premeditation.

Whether or not you find premeditation, if you find each of the other elements has been proven beyond a reasonable doubt, except you find the defendant acted in the heat of passion, the defendant is guilty of manslaughter in the first degree and not murder in the first degree.

If you find any other element has not been proven beyond a reasonable doubt, the defendant is not guilty of murder in the first or second degree, or of manslaughter in the first degree.

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#### COMMENT

M.S.A. §§ 609.18; 609.185; 609.20.

Submission of a "heat of passion" manslaughter instruction was not appropriate where evidence supported finding of intentional unpremeditated second-degree murder and where defendant's own testimony was that decedent was stabbed as a result of his accidentally falling on the knife. *State v. Fulford*, 290 Minn. 236, 187 N.W.2d 270 (1971). Hot blood is not complete excuse for killing of another but is an extenuating



circumstance which court considers in fixing measure of guilt and consequent punishment for it, and it is emotional status of defendant which is of primary importance in determining whether homicide is murder or manslaughter in first degree. *State v. Boyce*, 284 Minn. 242, 170 N.W.2d 104 (1969).

An instruction on a lesser charge should be submitted when: (1) the offense in question is an “included” offense and (2) a rational basis exists for the jury to convict defendant of the lesser offense and acquit him of the greater crime. *State v. Buntrock*, 560 N.W.2d 383 (1997).

An instruction on manslaughter in the first degree may be required, even though there is no direct evidence of a heat of passion, and the defendant’s own testimony is inconsistent with such a factor. *State v. Leinweber*, 303 Minn. 414, 228 N.W.2d 120 (1975).

It is frequently held that “a provoked defendant cannot have the homicide reduced to voluntary manslaughter where the time elapsing between the provocation and the death blow is such that a reasonable man thus provoked would have cooled.” LaFave and Scott, *Criminal Law* 579 (1972). The Minnesota cases have not specifically discussed this “cooling-off” period or gone into the question of a subjective or objective test. Since the concept of “cooling-off” seems implicit in the requirement that the killing must have been done in a heat of passion, it would seem no instruction should be necessary.

In *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995), the Minnesota Supreme Court held that when there is sufficient evidence for a jury reasonably to infer that the defendant caused the death of another person in the heat of passion, the State has the burden to prove beyond a reasonable doubt the absence of heat of passion.



**CRIMJIG 11.06****MURDER IN THE FIRST DEGREE—CRIMINAL  
SEXUAL CONDUCT IN THE FIRST OR SECOND  
DEGREE—DEFINED**

Under Minnesota law, a person causing the death of another person while committing or attempting to commit criminal sexual conduct in the (first)(or)(second) degree with force or violence is guilty of the crime of murder in the first degree.

Criminal sexual conduct in the (first) (or) (second) degree is defined as follows: \_\_\_\_.<sup>1</sup>

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**COMMENT**

M.S.A. § 609.185(2).

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**11.06**

<sup>1</sup>Because of the complexity of the statutes governing criminal sexual conduct, no attempt has been made to include the definition of that crime in

the text of this instruction. The definition of that crime should be taken from the instructions in Chapter Twelve, depending upon the acts alleged in the indictment or complaint.

**CRIMJIG 11.07****MURDER IN THE FIRST DEGREE—CRIMINAL  
SEXUAL CONDUCT IN THE FIRST OR SECOND  
DEGREE—ELEMENTS**

The elements of murder in the first degree as alleged in this case are:

First, the death of \_\_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_\_. The State need not prove the defendant intended to cause the death of \_\_\_\_\_ or of anyone else.

Third, the defendant, at the time of the act, was committing or was attempting to commit criminal sexual conduct in the (first) (or) (second) degree.<sup>1</sup>

Fourth, the defendant acted with force or violence. A defendant acts with "force or violence" if the defendant intentionally inflicts or attempts to inflict bodily harm upon another person, or intentionally causes fear in the other person of immediate bodily harm or death (or if the defendant commits any crime against another person or threatens to do so). "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**11.07**

<sup>1</sup>The act or attempted act of criminal sexual conduct as alleged in the indictment or complaint. If further

definition is required, the elements of the crime as defined in the appropriate instruction in Chapter Twelve should be given.

**COMMENT**

M.S.A. § 609.185(a)(2).

While there is no authority on the question in Minnesota, most courts have held that “violence” means “physical force” and that the term “force or violence” means the same thing as “force,” which is defined in the statute governing criminal sexual conduct. See M.S.A. § 609.341, subd. 3; CRIMJIG 12.01.



**CRIMJIG 11.08****MURDER IN THE FIRST DEGREE—WHILE  
COMMITTING CERTAIN CRIMES—DEFINED**

Under Minnesota law, a person causing the death of another person with intent to kill that person (or another) while committing or attempting to commit the crime of (burglary)(aggravated robbery)(kidnapping)(arson in the first or second degree)(drive-by shooting)(tampering with a witness in the first degree)(escape from custody)(a felony involving the unlawful sale of a controlled substance) is guilty of the crime of murder in the first degree. This is also known as felony murder.

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**COMMENT**

M.S.A. § 609.185(a)(3).

**CRIMJIG 11.09****MURDER IN THE FIRST DEGREE—WHILE  
COMMITTING CERTAIN CRIMES—ELEMENTS**

The elements of murder in the first degree are:

First, the death of \_\_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_\_.

Third, the defendant acted with the intent (to effect the death of) (to kill) \_\_\_\_\_ (or \_\_\_\_\_), (or another person). To find the defendant had an intent (to effect the death of a person) (to kill), you must find that the defendant acted with the purpose of causing death, or believed that the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary that defendant's act be premeditated.

Fourth, at the time of the act causing the death of \_\_\_\_\_, the defendant was engaged in the act of committing or attempting to commit the crime of \_\_\_\_\_.<sup>1</sup>

(Here insert definition and elements of underlying crime and the Attempt instruction if appropriate.)

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.185(a)(3).

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11.09

of crimes.

<sup>1</sup>See M.S.A. 609.185(a)(3) for list

This instruction is designed to be adapted to any one or more of the crimes listed in paragraph (3) by inserting in the blank spaces the name of the particular crime the defendant was committing or was attempting to commit. Refer to other sections of CRIMJIG for definitions of the particular crime and the word “attempt.”

The State is required to prove that defendant committed or attempted to commit the predicate felony. The court should be careful to instruct the jury on all essential elements of underlying crime, each of which must be proved beyond a reasonable doubt. Failure to fully instruct the jury is plain error unless the defendant stipulates to the underlying crime. See *State v. Charles*, 634 N.W.2d 425 (Minn. App. 2001).

In *State v. Nielsen*, 467 N.W.2d 615 (Minn. 1991), the Supreme Court held that the felony-murder rules applies even when the underlying felony is completed after the homicide, provided that the felony and homicide are parts of a single continuous transaction.

In evaluating whether kidnapping can serve a predicate offense for felony murder, the Supreme Court decided in *State v. Smith*, 669 N.W.2d 19 (Minn. 2003), *overruled on other grounds*, *State v. Leake*, 699 N.W.2d 312 (Minn. 2005), a sentencing case, that

confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime . . . Under our current sentencing scheme, convictions that solely rely on acts incidental to the commission of one crime—here confining [victim] in the course of murder—to constitute the elements of kidnapping (confinement) unduly exaggerate the criminality of the conduct. We conclude that where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping.

The Supreme Court held, in *State v. Pendleton*, 724 N.W. 2d 717 (Minn. 2007) that the jury instructions for felony murder while committing kidnapping do not require the jury to unanimously agree on a single purpose under the purpose element of kidnapping, finding that while the jury must unanimously find that the state has proved each element of a crime, the jury does not have to unanimously agree on the facts underlying an element of the crime.



**CRIMJIG 11.10****MURDER IN THE FIRST DEGREE—PEACE  
OFFICER, PROSECUTING ATTORNEY, JUDGE, OR  
GUARD—DEFINED**

Under Minnesota law, a person causing the death of a (peace officer) (prosecuting attorney) (judge) (guard employed at a Minnesota state or local correctional facility while that person is engaged in the performance of official duties, with intent to effect the death of that person or another is guilty of the crime of murder in the first degree.

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**COMMENT**

M.S.A. § 609.185(a)(4).

**CRIMJIG 11.11****MURDER IN THE FIRST DEGREE—PEACE  
OFFICER OR GUARD—ELEMENTS**

The elements of murder in the first degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant acted with the intent (to effect the death of) (to kill) \_\_\_\_ (or\_\_\_\_) (or another person). To find the defendant had the "intent (to effect the death of a person) (to kill)," you must find the defendant acted with the purpose of causing death, or believed the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary the defendant's act be premeditated

Fourth, at the time the defendant committed the act that caused the death of \_\_\_\_, that person was a (peace officer) (prosecuting attorney) (judge) (guard employed at a Minnesota state or local correctional facility). The State need not prove the defendant knew \_\_\_\_ was a (peace officer) (prosecuting attorney) (judge) (guard employed at a Minnesota state or local correctional facility).

Fifth, at the time the defendant committed the act that caused the death of \_\_\_\_, that person was engaged in the performance of official duties as a (peace officer) (prosecuting attorney) (judge) (guard employed at a Minnesota state or local correctional facility).<sup>1</sup>

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**11.11**

<sup>1</sup>It may be necessary to define "peace officer" or "guard." For statutory definitions of "peace officer," see M.S.A. § 626.84, subd. 1(c); § 609.487, subd. 2; § 626.05, subd. 2; § 352.01,

subd. 2. There is no statutory definition of "guard," and those who act in that position are frequently designated under civil service laws and personnel regulations as "correctional counselors" or "correctional officers."

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

The elements of murder in the first degree are:

First, the death of \_\_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_\_.

Third, the defendant acted with the intent to kill \_\_\_\_\_ (or \_\_\_\_\_), (or another person). To find the defendant had an intent to kill, you must find that the defendant acted with the purpose of causing death, or believed that the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary that the defendant's act be premeditated.

Fourth, at the time the defendant committed the act that caused the death of \_\_\_\_\_, the decedent was a (peace officer) (guard employed at a Minnesota state or a local correctional facility).

Fifth, at the time the defendant committed the act that caused the death of \_\_\_\_\_, the decedent was engaged in the performance of official duties as a (peace officer) (guard employed at a Minnesota state or a local correctional facility).<sup>2</sup>

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

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<sup>2</sup>It may be necessary to define "peace officer" or "guard." For statutory definitions of "peace officer," see M.S.A. § 626.84, subd. 1(c); § 609.487, subd. 2; § 626.05, subd. 2; § 352.01, subd. 2. There is no statutory defini-

tion of "guard," and those who act in that position are frequently designated under civil service laws and personnel regulations as "correctional counselors" or "correctional officers."



If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.185(a)(4).

In *State v. Brown*, 345 N.W.2d 233 (Minn. 1984), the Supreme Court upheld this statute against the claim that it violated the Equal Protection Clause of the Fourteenth Amendment on the basis that a person who kills a peace officer is treated differently than a person who kills someone else. The Court held that the statute had as a rational basis the intent to deter the killing of peace officers and was therefore constitutional.

In *State v. Angulo*, 471 N.W.2d 570 (Minn. App. 1991), the Court of Appeals held that the statute making the killing of a peace officer first degree murder does not require the State to prove the defendant knew or should have known that the victim was a peace officer.

**CRIMJIG 11.12**

**MURDER IN THE FIRST DEGREE—CHILD ABUSE—  
DEFINED**

Under Minnesota law, a person who has engaged in a past pattern of child abuse against any child and causes the death of a child while committing child abuse and manifesting an extreme indifference to human life is guilty of the crime of murder in the first degree.

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**COMMENT**

M.S.A. § 609.185(a)(5).

The Committee, in attempting to interpret this statute, believes that the terms “minor” and “child” used in the statute refer to the same person.

**CRIMJIG 11.13****MURDER IN THE FIRST DEGREE—CHILD ABUSE—ELEMENTS**

The elements of murder in the first degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, \_\_\_\_ was a minor. A minor is a person under eighteen years of age.

Third, the death of \_\_\_\_ occurred while the defendant was committing child abuse. Minnesota statutes define “child abuse” as \_\_\_\_.<sup>1</sup>

Fourth, the defendant engaged in a past pattern of child abuse upon any child. [A “past pattern” consists of prior acts of domestic abuse which form a reliable sample of observable traits or acts which characterize an individual’s behavior. More than one prior act of domestic abuse is required for there to be a past pattern.]

Fifth, the death of \_\_\_\_ occurred under circumstances manifesting an extreme indifference to human life.

Sixth, the defendant’s act(s) took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**COMMENT**

In *State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002) the Supreme Court held that the state was not required to demonstrate, as separate ele-

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**11.13**

crimes constituting child abuse.

<sup>1</sup>See M.S.A. § 609.185(b) for



ments, each incident of prior child abuse beyond a reasonable doubt to establish a past pattern of child abuse. Such a requirement would pose an undue burden on the state. Individual acts constituting the pattern of child abuse would be difficult to prove, particularly with a young child who could not self-report. *See also State v. Manley*, 658 N.W.2d 550 (Minn. 2003), reinstated by order June 23, 2003 C8-01-1833, a case involving domestic abuse murder, which relies upon the “past pattern” holding of *Kelbel*.

In a case involving the establishment of a “past pattern,” the Court of Appeals held, in *State v. Stillday*, 646 N.W.2d 557 (Minn. App. 2002), that defendant’s pretrial offer to stipulate to prior conviction of terroristic threats did not eliminate the state’s right to offer evidence on the subject, especially where the evidence has relevance beyond the stipulation. The district court has discretion to permit the state to present evidence of the underlying facts, applying an analysis similar to that applied under Minn. R. Evid. 403.

**CRIMJIG 11.14****MURDER IN THE FIRST DEGREE—DOMESTIC  
ABUSE—DEFINED**

Under Minnesota law, a person who has engaged in a past pattern of domestic abuse and causes the death of another person while committing domestic abuse and manifesting an extreme indifference to human life is guilty of the crime of murder in the first degree.

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**COMMENT**

M.S.A. § 609.185(a)(6). See M.S.A. § 609.185(e) for acts constituting “domestic abuse.”

**CRIMJIG 11.15****MURDER IN THE FIRST DEGREE—DOMESTIC ABUSE—ELEMENTS**

The elements of murder in the first degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the death of \_\_\_\_ occurred while the defendant was committing domestic abuse. Minnesota statutes define “domestic abuse” as \_\_\_\_.<sup>1</sup>

Third, the defendant engaged in a past pattern of domestic abuse against \_\_\_\_ (and)(or) (upon another family or household member<sup>2</sup>). A “past pattern” consists of prior acts of domestic abuse which form a reliable sample of observable traits or acts which characterize an individual’s behavior. More than one prior act of domestic abuse is required for there to be a past pattern. [When more than two prior acts of domestic violence are alleged, each juror must agree that more than one act has been proven beyond a reasonable doubt. The jury does not have to be unanimous about which acts are proven beyond a reasonable doubt, but must be unanimous that more than one prior act of domestic violence occurred.<sup>3</sup>]

Fourth, the death of \_\_\_\_ occurred under circumstances manifesting an extreme indifference to human life.

Fifth, the defendant’s act took place on (or about) \_\_\_\_, in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a rea-

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11.15

<sup>1</sup>See M.S.A. § 609.185(e); M.S.A. § 518B.01, subd. 2(a).

<sup>2</sup>See M.S.A. § 518B.01, subd. 2(b)

for definition of family or household member.

<sup>3</sup>See *State v. Bustos*, 861 N.W.2d 655 (Minn. 2015)



sonable doubt, the defendant is not guilty of this charge.

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COMMENT

See M.S.A. § 634.20 on evidence of similar conduct against the victim of domestic abuse or against other family or household members. Evidence of such similar prior conduct is not *Spriegl* evidence and is not subject to an independent *Spriegl* analysis. In *State v. Bell*, 719 N.W.2d 635 (Minn. 2006), a burglary prosecution in which the defendant's former girlfriend was the victim, the Supreme Court held that Minn. Stat. § 634.20 did not require the trial court to do an independent analysis of the State's need for the evidence before admitting the defendant's two prior violations of an order for protection which had barred the defendant from having contact with his former girlfriend.

In *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004) the Supreme Court held that M.S.A. § 634.20, the domestic abuse statute, did not violate the Separation of Powers Doctrine by allowing admission of similar prior conduct without requiring that the prior incident be proven by clear and convincing evidence (as required by the evidentiary rule governing admission of prior bad acts). Evidence of prior domestic violence is conceptually distinct from evidence of prior bad acts to show identity, modus operandi, intent or opportunity, because domestic abuse often involves the same victim and is offered to show the relationship between the defendant and the victim.

The definition of "past pattern" comes from *State v. Robinson*, 539 N.W.2d 231 (1995). In upholding the constitutionality of the past-pattern of domestic abuse statute against a vagueness challenge, the court held "the pattern of activity which is an element of domestic abuse murder is carefully limited to a small number of criminal acts and a narrow group of victims." The "victim" in a past pattern of domestic abuse extends not only to the immediate victim but other household members as well. See M.S.A. § 518B.01, subd. 2(b).

The Supreme Court in *State v. Sanchez-Diaz*, 683 N.W.2d 231 (1995) indicated that the instruction should indicate that multiple prior acts of domestic abuse were required to establish a "past-pattern."

The Supreme Court has held that while the state must prove a "past pattern" beyond a reasonable doubt, it is not required to prove each separate act beyond a reasonable doubt. *State v. Manley*, 658 N.W.2d 550 (Minn. 2003) (domestic abuse murder); *State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002) (child abuse murder). Both cases rely on *State v. Cross*, 577 N.W.2d 721 (Minn. 1998), which holds that it is the pattern, not the individual acts making up the pattern, that must be proven beyond a reasonable doubt.

In establishing a "past pattern" of conduct, the Court of Appeals held, in *State v. Stillday*, 646 N.W.2d 557 (Minn. App. 2002) that

defendant's pretrial offer to stipulate to prior conviction of terroristic threats did not eliminate the state's right to offer evidence on the subject, especially where the evidence has relevance beyond the stipulation. The district court has discretion to permit the state to present evidence of the underlying facts, applying an analysis similar to that applied under Minn. R. Evid 403.

While the Minnesota Supreme Court has declined to add a specific temporal requirement to separate acts of domestic abuse, it has held that the "events must be sufficiently proximate in time to constitute a 'pattern.'" *State v. Cross*, 577 N.W.2d 721 (Minn. 2004). In *State v. Clark*, 739 N.W.2d 412 (Minn. 2007), the court, relying on *Cross*, held that two incidents occurring thirteen to fifteen years earlier were not sufficiently proximate in time to recent incidents to be part of a pattern of domestic abuse.

**CRIMJIG 11.16****MURDER OF AN UNBORN CHILD IN THE FIRST  
DEGREE—PREMEDITATION—DEFINED**

Under the laws of Minnesota, a person causing the death of an unborn child with premeditation and with the intent to kill the unborn child (or another) is guilty of murder of an unborn child in the first degree.

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**COMMENT**

M.S.A. § 609.2661(1).

In *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), *cert. denied*, 496 U.S. 931, 110 S. Ct. 2633, 110 L.Ed.2d 653 (1990), the Supreme Court rejected equal protection and due process challenges to M.S.A. § 609.2661 and M.S.A. § 609.2662, the unborn child homicide statutes.

In *State v. Bauer*, 471 N.W.2d 363 (Minn. App. 1991), the Court of Appeals rejected a claim that Minnesota fetal homicide statutes violated the establishment clause of the First Amendment.



**CRIMJIG 11.17****MURDER OF AN UNBORN CHILD IN THE FIRST DEGREE—PREMEDITATION—ELEMENTS**

The elements of murder of an unborn child in the first degree as alleged in this case are:

First, the death of an unborn child must be proven. An “unborn child” is the unborn offspring of a human being conceived, but not yet born. The State does not need to prove the unborn child was viable or was known to the defendant.

Second, the defendant caused the death of the unborn child.

Third, the defendant acted with the intent (to effect the death of) (to kill) \_\_\_\_ (or \_\_\_\_ ) (or another person). To find the defendant had the “intent (to effect the death of another person) (to kill),” you must find the defendant acted with the purpose of causing death (or must have believed the act would have that result).

Fourth, the defendant acted with premeditation. “Premeditation” means the defendant considered, planned, prepared for, or determined to commit the act before the defendant committed it. Premeditation, being a process of the mind, is wholly subjective and hence not always susceptible to proof by direct evidence. It may be inferred from all the circumstances surrounding the event. It is not necessary for premeditation to exist for a specific length of time. While premeditation requires no specific period of time for deliberation, some amount of time must pass between the formation of the intent and the carrying out of the act. A premeditated decision to kill may be reached in a short period of time. However, an unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated.

[If the defendant acted with premeditation and with the intent to cause the death of \_\_\_\_ (a person other than the unborn child), the element of premeditation and intent to cause death is satisfied, even though the defendant did not intend to cause the death of the unborn child.]

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge.

If you have a reasonable doubt there was premeditation, but you find all the other elements have been proven, the defendant is guilty of murder in the second degree. The crime of murder in the second degree differs from murder in the first degree only in that the killing was done with intent to kill, but not with premeditation.

If you find that any element other than premeditation has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

**CRIMJIG 11.18****MURDER OF AN UNBORN CHILD—HEAT OF  
PASSION—MURDER AND MANSLAUGHTER  
DISTINGUISHED**

Under Minnesota law, a person causing the death of an unborn child while acting in the heat of passion is guilty of manslaughter in the first degree, rather than murder. "Heat of passion" is provoked by such words or acts of another person that would provoke a person of ordinary self-control in like circumstances. [But the crying of a child can never be adequate provocation to cause heat of passion resulting in the death of the child.]

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**COMMENT**

M.S.A. § 609.2664(1).



**CRIMJIG 11.19****MURDER OF AN UNBORN CHILD IN THE FIRST DEGREE—PREMEDITATION—ISSUE OF HEAT OF PASSION AS ELEMENT**

The elements of murder in the first degree as alleged in this case are:

First, the death of an unborn child must be proven. An "unborn child" is the unborn offspring of a human being conceived, but not yet born. The State does not need to prove the unborn child was viable or was known to the defendant.

Second, the defendant caused the death of the unborn child.

Third, the defendant acted with the intent (to effect the death of) (to kill) the unborn child (or \_\_\_\_ ) (or another person). To find the defendant had the "intent (to effect the death of a person) (to kill)," you must find the defendant acted with the purpose of causing death, or believed the act would have that result.

Fourth, the defendant acted with premeditation. "Premeditation" means the defendant considered, planned, prepared for, or determined to commit the act before the defendant committed it. Premeditation, being a process of the mind, is wholly subjective and hence not always susceptible to proof by direct evidence. It may be inferred from all the circumstances surrounding the event. It is not necessary for premeditation to exist for a specific length of time. While premeditation requires no specific period of time for deliberation, some amount of time must pass between the formation of the intent and the carrying out of the act. A premeditated decision to kill may be reached in a short period of time. However, an unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated.

Fifth, the defendant did not act in the heat of passion provoked by such words or acts as would provoke a person of ordinary self-control in like circumstances. Even if the defendant acted with premeditation and with the intent to kill the unborn child (or \_\_\_\_ ) (or another person), if the defendant acted in the

heat of passion, the defendant is not guilty of murder in the first degree. However, such heat of passion is not a complete defense for the killing of an unborn child. The heat of passion may cloud the defendant's reason and weaken willpower, and this is a circumstance the law considers in fixing the degree of guilt. If the heat of passion is provoked by words or acts that would provoke a person of ordinary self-control in the same circumstances, an intentional killing is reduced to manslaughter in the first degree. [But the crying of a child can never be adequate provocation to cause heat of passion resulting in the death of the child.] The State has the burden to prove beyond a reasonable doubt the defendant did not act in the heat of passion.

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge.

If you have a reasonable doubt there was premeditation, but you find each of the other elements has been proven beyond a reasonable doubt, the defendant is guilty of murder in the second degree. The crime of murder in the second degree differs from murder in the first degree only in that the killing was done with intent to kill a person, but not with premeditation.

Whether or not you find premeditation, if you find each of the other elements has been proven beyond a reasonable doubt, except you find the defendant acted on the heat of passion, the defendant is guilty of manslaughter in the first degree and not murder in the first degree.

If you find any other element has not been proven beyond a reasonable doubt, the defendant is not guilty of murder in the first or second degree, or of manslaughter in the first degree.

**CRIMJIG 11.20****MURDER OF AN UNBORN CHILD IN THE FIRST DEGREE—CRIMINAL SEXUAL CONDUCT IN THE FIRST OR SECOND DEGREE—DEFINED**

Under Minnesota law, a person causing the death of an unborn child while committing or attempting to commit criminal sexual conduct in the (first)(or)(second) degree with force or violence either upon or affecting the mother of the unborn child or another is guilty of murder of an unborn child in the first degree.

Criminal sexual conduct in the (first)(or)(second) degree is defined as follows: \_\_\_\_\_<sup>1</sup>

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**COMMENT**

M.S.A. § 609.2661(2).

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**11.20**

<sup>1</sup>Because of the complexity of the statutes governing criminal sexual conduct, no attempt has been made to include the definitions of that crime in

the text of this instruction. The definition of that crime should be taken from the instructions in Chapter Twelve, depending upon the acts alleged in the indictment or complaint.



**CRIMJIG 11.21****MURDER OF AN UNBORN CHILD IN THE FIRST DEGREE—CRIMINAL SEXUAL CONDUCT IN THE FIRST OR SECOND DEGREE—ELEMENTS**

The elements of murder of an unborn child in the first degree as alleged in this case are:

First, the death of an unborn child must be proven. An “unborn child” is the unborn offspring of a human being conceived, but not yet born. The State does not need to prove the unborn child was viable or was known to the defendant.

Second, the defendant caused the death of the unborn child. It does not matter that the defendant may not have intended to cause the death of the unborn child or of anyone else.

Third, the defendant, at the time of the act, was committing or attempting to commit criminal sexual conduct in the (first-)(or)(second) degree upon or affecting the mother of the unborn child or another.

Fourth, the defendant acted with force or violence. A person acts with “force or violence” if the person intentionally inflicts or attempts to inflict bodily harm upon another person, or intentionally causes fear in the other person of immediate bodily harm or death (or if the person commits any crime against another person or threatens to do so). “Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.

Fifth, the defendant’s act took place on (or about) \_\_\_\_ in \_\_\_\_County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

**CRIMJIG 11.22****MURDER OF AN UNBORN CHILD IN THE FIRST  
DEGREE—WHILE COMMITTING CERTAIN  
CRIMES—DEFINED**

Under Minnesota law, a person who causes the death of an unborn child while committing or attempting to commit the crime of (burglary)(aggravated robbery)(kidnapping)(arson in the first or second degree)(tampering with a witness in the first degree)(escape from custody), and intending to effect the death of an unborn child (or another), is guilty of murder of an unborn child in the first degree.

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**COMMENT**

M.S.A. § 609.2661(3).

**CRIMJIG 11.23****MURDER OF AN UNBORN CHILD IN THE FIRST DEGREE—WHILE COMMITTING CERTAIN CRIMES—ELEMENTS**

The elements of murder of an unborn child in the first degree as alleged in this case are:

First, the death of an unborn child must be proven. An “unborn child” is the unborn offspring of a human being conceived, but not yet born. The State does not need to prove the unborn child was viable or was known to the defendant

Second, the defendant caused the death of an unborn child.

Third, the defendant acted with the intent (to effect the death of) (to kill) the unborn child (or \_\_\_\_)(or another person). To find the defendant had an “intent (to effect the death) (to kill),” you must find the defendant acted with the purpose of causing death, or believed the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary that the defendant’s act be premeditated.

Fourth, at the time of the act causing the death of the unborn child, the defendant was engaged in the act of committing or attempting to commit the crime of \_\_\_\_.<sup>1</sup>

[Here insert the definitions and elements of the predicate crime and the Attempt instruction if appropriate.]

Fifth, the defendant’s act took place on (or about) \_\_\_\_in \_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a rea-

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11.23

list of predicate crimes.

<sup>1</sup>See M.S.A. § 609.2661(3) for the



sonable doubt, the defendant is not guilty of this charge.

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COMMENT

M.S.A. § 609.2661(3).

This instruction is designed to be adapted to any one or more of the crimes listed in paragraph (3) by inserting in the blank spaces the name of the particular crime the defendant was committing or was attempting to commit. Refer to other sections of CRIMJIG for definitions of the particular crime and Chapter 5 for “attempt.”

**CRIMJIG 11.24****MURDER IN THE SECOND DEGREE—DEFINED**

Under the laws of Minnesota, a person intentionally causing the death of another person, but without premeditation, is guilty of murder in the second degree.

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**COMMENT**

M.S.A. § 609.19, subd. 1(1).

Although it is not a defense to a charge of murder in the second degree that the killing was premeditated, the words “but without premeditation” should be used in the definition, since the jurors in the present case or in other contexts will have heard of the requirement of premeditation in murder in the first degree.

If the evidence raises the question whether the killing may have occurred in the heat of passion, reducing the crime to manslaughter in the first degree, CRIMJIG 11.04 should be read with this instruction (deleting the references to premeditation).

**CRIMJIG 11.25****MURDER IN THE SECOND DEGREE—ELEMENTS**

The elements of murder in the second degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant acted with the intent (to effect the death of) (to kill) \_\_\_\_ (or \_\_\_\_)(or another person). To find the defendant had an "intent (to effect the death of) (to kill)," you must find the defendant acted with the purpose of causing death, or believed the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary that the defendant's act be premeditated.

Fourth, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**COMMENT**

M.S.A. § 609.19, subd. 1(1).

For most intentional crimes, nothing is said in the instructions about the manner in which intent is proven. In a typical prosecution for murder in the second degree, however, the inference to be drawn from the act is not as clear. There may be a question whether the defendant's intent was to kill or only to injure, and any conclusion must be drawn from all the surrounding circumstances. When murder in the second degree is charged as a lesser crime to murder in the first degree, the jury will have been instructed in similar fashion with respect to the proof of premeditation (see CRIMJIG 11.02), and it is unnecessary to speak specifically about the manner of proving intent.



The statement that "It is not necessary that the defendant's act be premeditated" is included because the members of the jury, through earlier service or from their general experience, may be cognizant of the term, and they should be instructed that it is unnecessary in murder in the second degree. The phrase should be omitted if it is felt that it will unnecessarily confuse the jury.

**CRIMJIG 11.26****MURDER IN THE SECOND DEGREE—DRIVE-BY  
SHOOTING—DEFINED**

Under Minnesota law, a person causing the death of another person while committing or attempting to commit a drive-by shooting is guilty of murder in the second degree.

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**COMMENT**

M.S.A. § 609.19, subd. 1(2).

Note that in 1998 M.S.A. § 609.185(a)(3) was amended to make a drive-by shooting a first degree offense. *See* CRIMJIG 11.09 for that instruction. The difference is in proof of the element of intent. *See* CRIMJIGs 32.03 and 32.04 for reckless drive-by shooting.

**CRIMJIG 11.27****MURDER IN THE SECOND DEGREE—DRIVE-BY  
SHOOTING—ELEMENTS**

The elements of murder in the second degree as alleged in this case are:

First, the death of \_\_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_\_.

Third, the death of \_\_\_\_\_ was caused while the defendant was committing or attempting to commit the crime of drive-by shooting. The statutes of Minnesota provide that whoever (in) (having just exited from) a motor vehicle, recklessly discharges a firearm at or toward (another motor vehicle) (a building), is guilty of the crime of drive-by shooting. It is not necessary for the State to prove any intent on the part of the defendant to kill anyone. ("Motor vehicle" means a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water, or in the air.<sup>1</sup>) ("Building" means a structure suitable for affording shelter for human beings including any appurtenant or connected structure.<sup>2</sup>)

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**COMMENT**

M.S.A. § 609.19, subd. 1(2).

See M.S.A. § 609.66, subd 1e, for the crime of drive-by shooting.

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**11.27**

<sup>1</sup>See Minn. Stat. § 609.52, subd. 2.

<sup>2</sup>See Minn. Stat. § 609.581, subd.



Note that in *State v. Hayes*, 826 N.W.2d 799 (Minn. 2013), the Supreme Court held that there must be evidence that the defendant recklessly discharged a weapon at another motor vehicle or a building for the defendant to be found guilty of a drive-by shooting. Firing at or toward a person is a sentence-enhancing provision and not a part of this subdivision of the statute. In this case, although defendant deliberately murdered the victim, there was no showing that this involved a reckless discharge toward another motor vehicle or a building. The Court noted that this case involved a discharge into the vehicle defendant occupied and not “another” (i.e., a different) vehicle. The Court invited the legislature to correct this “strange result.”

## CRIMJIG 11.28

MURDER IN THE SECOND DEGREE—WHILE  
COMMITTING A FELONY—DEFINED

Under Minnesota law, a person causing the death of another person, without intent to cause the death of any person, while committing or attempting to commit a felony offense<sup>1</sup> is guilty of the crime of murder in the second degree.

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COMMENT

M.S.A. § 609.19, subd. 2.

See M.S.A. § 609.185(a)(3) and CRIMJIG 11.08 defining murder in the first degree while committing specified crimes.

In *State v. Aarsvold*, 376 N.W.2d 518 (Minn. App. 1985), the Court of Appeals held that since the sale of cocaine alone does not justify the assumption that the purchaser is incurring a substantial and unjustified risk of death, sale of cocaine is not a proper felony upon which to base a charge of felony murder under M.S.A. § 609.19(2).

In *State v. Branson*, 487 N.W.2d 880 (Minn. 1992), the Supreme Court held that the felony murder statute of M.S.A. § 609.19, subd. 2(1), does not extend to a situation in which a by-stander is killed during an exchange of gunfire in which the defendant allegedly participated, but in which the fatal shot was fired by someone in a group adverse to the defendant, rather than the defendant or someone associated with the defendant.

In *State v. Gorman*, 532 N.W.2d 229 (Minn. App. 1995), *aff'd*, 546 N.W.2d 5 (1996), the Court of Appeals held that any kind of assault that inflicts bodily harm is committed “with force,” as required to be a predicate felony for felony murder.

Not all felony offenses serve as a predicate offense for murder in the second degree. The Supreme Court in *State v. Anderson*, 666 N.W.2d 696 (Minn. 2003) reiterated its holding that only those felonies that pose “a special danger to human life” may serve as predicate offenses. (See *State v. Back*, 341 N.W.2d 273 (Minn. 1983)). This standard requires the court to consider both the elements of the underlying felony in the abstract and the circumstances under which the felony was committed.

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11.28

<sup>1</sup>Other than criminal sexual con-

duct in the first or second degree with force or violence, or drive-by shooting.

**CRIMJIG 11.29****MURDER IN THE SECOND DEGREE—WHILE  
COMMITTING A FELONY—ELEMENTS**

The elements of murder in the second degree as charged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant, at the time of causing the death of \_\_\_\_, was committing or attempting to commit the felony offense of \_\_\_\_\_. It is not necessary for the State to prove the defendant had an intent (to effect the death of) (to kill) \_\_\_\_\_ (or another person), but it must prove defendant committed or attempted to commit the underlying felony.

(Here insert definition and elements of underlying felony, and the "Attempt" instruction if appropriate.)

(Insert appropriate element number)(Fourth), the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**COMMENT**

M.S.A. § 609.19, subd. 2.

The State is required to prove that the defendant committed or attempted to commit the predicate felony. The court should be careful to instruct the jury on all essential elements of underlying crime. Failure to fully instruct the jury is plain error unless the defendant stipulates to the underlying crime. *See State v. Charles*, 634 N.W.2d 425 (Minn. App. 2001).

*See* Comments to CRIMJIGs 11.02 and 11.29.

In *State v. Cole*, 542 N.W.2d 43 (Minn. 1996), the Supreme Court,



citing the language of this instruction, held that lack of intent is not an essential element to second degree felony murder.

**CRIMJIG 11.30****MURDER IN THE SECOND DEGREE—DOMESTIC  
ABUSE—DEFINED**

Under Minnesota law, a person causing the death of another person, without intending to cause the death of any person, while intentionally inflicting or attempting to inflict bodily harm upon any person protected from defendant by (an order for protection)(a harassment restraining order)(a no-contact order) is guilty of the crime of murder in the second degree.

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**COMMENT**

M.S.A. § 609.19, subd. 2(2).

**CRIMJIG 11.31****MURDER IN THE SECOND DEGREE—DOMESTIC  
ABUSE—ELEMENTS**

The elements of murder in the second degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the death of \_\_\_\_ occurred while the defendant was intentionally inflicting or attempting to inflict bodily harm upon \_\_\_\_\_. "Bodily harm" means any physical pain or injury, illness, or any impairment of physical condition.

Third, at the time of the defendant's act, the defendant was restrained under (an order for protection)(a harassment restraining order)(a no-contact order).<sup>1</sup>

Fourth, \_\_\_\_ was a person designated to receive protection under the order.

Fifth, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**COMMENT**

M.S.A. § 609.19, subd. 2(2).

Note that, from the comment to CRIMJIG 11.32, it is the opinion of

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**11.31**

<sup>1</sup>An "order for protection" includes an order for protection issued under M.S.A. Chapter 518B, a harassment restraining order issued under M.S.A. § 609.748, a court order setting conditions of pretrial release or condi-

tions of a criminal sentence or juvenile court jurisdiction, a restraining order issued in a marriage dissolution action, or any similar order issued by a court of another State, an Indian tribal court, or a court of the United States.



the Committee that the name of the decedent need not be the same as that of the victim of domestic abuse in the second and fourth elements. *Cf. State v. Stewart*, 624 N.W.2d 585 (Minn.2001).

The Supreme Court has held that while the state must prove a “past pattern” beyond a reasonable doubt, it is not required to prove each separate act beyond a reasonable doubt. *State v. Manley*, 658 N.W.2d 550 (Minn. 2003), reinstated by order June 23, 2003 C8-01-1833 (domestic abuse murder); *State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002) (child abuse murder). Both cases rely on *State v. Cross*, 577 N.W.2d 721 (Minn. 1998), which states that it is the pattern, not the individual acts making up the pattern, that must be proven beyond a reasonable doubt.

**CRIMJIG 11.32****MURDER OF AN UNBORN CHILD IN THE SECOND  
DEGREE—DEFINED**

Under Minnesota law, a person intentionally causing the death of an unborn child, but without premeditation, is guilty of murder of an unborn child in the second degree.

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**COMMENT**

M.S.A. § 609.2662(1).

In *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), *cert. denied*, 496 U.S. 931, 110 S. Ct. 2633, 110 L.Ed.2d 653 (1990), the Supreme Court rejected equal protection and due process constitutional challenges to M.S.A. § 609.2661 and M.S.A. § 609.2662.

**CRIMJIG 11.33****MURDER OF AN UNBORN CHILD IN THE SECOND DEGREE—ELEMENTS**

The elements of murder of an unborn child in the second degree as alleged in this case are:

First, the death of an unborn child must be proven. An "unborn child" is the unborn offspring of a human being conceived, but not yet born. The State does not need to prove the unborn child was viable or was known to the defendant

Second, the defendant caused the death of an unborn child.

Third, the defendant acted with the intent to effect the death of the unborn child (or \_\_\_\_)(or another person). To find the defendant had "the intent to effect death," you must find the defendant acted with the purpose of causing death, or believed the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary the defendant's act be premeditated.

Fourth, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.



**CRIMJIG 11.34**

**MURDER OF AN UNBORN CHILD IN THE SECOND  
DEGREE—WHILE COMMITTING A FELONY—  
DEFINED**

Under Minnesota law, a person causing the death of an unborn child while committing or attempting to commit a felony offense (other than criminal sexual conduct in the first or second degree with force or violence), without intent to cause the death of any unborn child or person, is guilty of murder of an unborn child in the second degree.

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**COMMENT**

M.S.A. § 609.2662(2).

**CRIMJIG 11.35****MURDER OF AN UNBORN CHILD IN THE SECOND  
DEGREE—WHILE COMMITTING A FELONY—  
ELEMENTS**

The elements of murder of an unborn child in the second degree as alleged in this case are:

First, the death of an unborn child must be proven. An “unborn child” is the unborn offspring of a human being conceived, but not yet born. The State does not need to prove the unborn child was viable or was known to the defendant

Second, the defendant caused the death of an unborn child.

Third, the defendant, at the time of causing the death of an unborn child, was committing or attempting to commit the felony offense of \_\_\_\_\_. It is not necessary for the State to prove the defendant had an intent to effect the death of \_\_\_\_\_, but it must prove that defendant committed or attempted to commit the underlying felony.

(Here insert definition and elements of underlying felony and the Attempt instruction if appropriate.)

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**COMMENT**

The State is required to prove that defendant committed or attempted to commit the predicate felony. The court should be careful to instruct the jury on all essential elements of underlying crime. Failure to fully instruct the jury is plain error unless the defendant stipulates to the underlying crime. *See State v. Charles*, 634 N.W.2d 425 (Minn. App. 2001).

**CRIMJIG 11.36****MURDER IN THE SECOND DEGREE—ISSUE OF  
HEAT OF PASSION—ELEMENTS**

The elements of murder in the second degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant acted with the intent (to effect the death of) (to kill) \_\_\_\_ (or \_\_\_\_)(or another person). To find the defendant had "the intent (to effect the death of a person) (to kill)," you must find the defendant acted with the purpose of causing death, or believed the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary that the defendant's act be premeditated.

Fourth, the defendant did not act in the heat of passion provoked by such words or acts as would provoke a person of ordinary self-control in like circumstances. Even if the defendant acted with premeditation and with the intent (to effect the death of) (to kill) \_\_\_\_, (or \_\_\_\_)(or another person), if the defendant acted in the heat of passion, the defendant is not guilty of murder in the first degree. However, such heat of passion is not a complete defense for the killing of another person. The heat of passion may cloud the defendant's reason and weaken will-power, and this is a circumstance the law considers in fixing the degree of guilt. If the heat of passion is provoked by words or acts that would provoke a person of ordinary self-control in like circumstances, an intentional killing is reduced to manslaughter in the first degree. [But the crying of a child can never be adequate provocation to cause heat of passion resulting in the death of the child.] The State has the burden to prove beyond a reasonable doubt the defendant did not act in the heat of passion.

Fifth, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.



If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge.

If you find each of these elements has been proven beyond a reasonable doubt except the fourth element, the defendant is guilty of manslaughter in the first degree.

If you find any other element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.20(1). *See also* the Comment to CRIMJIG 11.05.

The distinction between murder and manslaughter is set forth in CRIMJIG 11.04.

In *State v. Thunberg*, 492 N.W.2d 534 (Minn. 1992), the Supreme Court held that it was error, but not reversible error in that case, in a prosecution for murder in the second degree to modify the jury instruction concerning manslaughter in the first degree when the killing is done in the heat of passion. The court instructed the jury that the provocation in the case of heat of passion manslaughter must be from the perspective of a “sober person” of ordinary self-control under like circumstances.

In *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995), the Supreme Court held that when there is sufficient evidence for a jury reasonably to infer that the defendant caused the death of another person in the heat of passion, the State had the burden to prove beyond a reasonable doubt the absence of heat of passion.

In *State v. Green*, 538 N.W.2d 698 (Minn. App. 1995), the Court of Appeals held that the trial court committed reversible error when it departed from the suggested language of this instruction.

The language in *State v. Fulford*, 290 Minn. 236, 187 N.W.2d 270 (1971), that manslaughter in the first degree is not an included offense in murder in the second degree, is believed to be inadvertent.

**CRIMJIG 11.37****MURDER IN THE THIRD DEGREE—DEPRAVED  
MIND—DEFINED**

Under Minnesota law, a person causing the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, but without intent to cause<sup>1</sup> the death of any person, is guilty of murder in the third degree.

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**11.37**

<sup>1</sup>Note: The statute (M.S.A. 609.195(a)) mentions "without intent to ef-

fect the death of any person." It is believed that terminology is unnecessarily confusing.

**CRIMJIG 11.38****MURDER IN THE THIRD DEGREE—DEPRAVED  
MIND—ELEMENTS**

The elements of murder in the third degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant's intentional act, which caused the death \_\_\_\_, was eminently dangerous to human beings<sup>1</sup> and was performed without regard for human life. Such an act may not be specifically intended to cause death, and may not be specifically directed at the particular person whose death occurred, but it is committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.

Fourth, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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**COMMENT**

M.S.A. § 609.195(a).

The words "depraved mind" have not been included in the elements. These words are not susceptible of definition, except in terms of an "eminently dangerous" act and the lack of regard for human life. Since those terms are used, the further use of the words "depraved mind" seems unnecessary and possibly prejudicial. The phrase "committed in a reckless or wanton manner" is drawn from *State v. Lowe*, 66 Minn. 296, 68 N.W. 1094 (1896).

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**11.38**

rather than "human beings."

<sup>1</sup>Note: The statute says "others"



In *State v. Stewart*, 276 N.W.2d 51 (Minn.1979); *State v. Reilly*, 269 N.W.2d 343 (Minn.1978); *State v. Hanson*, 286 Minn. 317, 176 N.W.2d 607 (1970); and *State v. Kopetka*, 265 Minn. 371, 121 N.W.2d 783 (1963), it is said that a charge under M.S.A. § 609.195 is not appropriate when the act of the defendant is specifically directed at the person who is killed.

**CRIMJIG 11.39****MURDER IN THE THIRD DEGREE—CONTROLLED  
SUBSTANCES—DEFINED**

Under Minnesota law, a person proximately causing the death of another by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering \_\_\_\_\_,<sup>1</sup> without intent to cause death, is guilty of murder in the third degree.

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**COMMENT**

M.S.A. § 609.195(b).

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**11.39**

substance.

<sup>1</sup>A Schedule I or II controlled

## CRIMJIG 11.40

MURDER IN THE THIRD DEGREE—CONTROLLED  
SUBSTANCES—ELEMENTS

The elements of murder in the third degree as alleged in this case are:

First, the death of \_\_\_\_\_ must be proven.

Second, the defendant was the proximate cause of \_\_\_\_\_'s death by, directly or indirectly, unlawfully (selling) (giving away) (bartering) (delivering) (exchanging) (distributing) (administering) \_\_\_\_\_.<sup>1</sup> A "proximate cause" is something that had a substantial part in bringing about the individual's death either directly and immediately or through happenings that follow one after another.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

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COMMENT

In *State v. Carithers*, 490 N.W.2d 620 (Minn. 1992), the Supreme Court reversed *State v. Carithers*, 484 N.W.2d 435 (Minn. App. 1992), concerning the applicability of M.S.A. § 609.195 relative to the special felony murder statute and drug overdose deaths. The Supreme Court held that a person who jointly acquires and possesses a controlled substance may not be convicted under this statute if the other joint possessor dies after ingesting the controlled substance. The Supreme Court stated it was addressing only the limited issue of drugs jointly acquired by two persons under circumstances where neither defendants' conduct could be fairly characterized as involving a sale or transfer or delivery of a controlled substance to the person who died.

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11.40

<sup>1</sup>Whether the substance in question is a Schedule I or II controlled

substance should be determined by the court. See CRIMJIG 20.01 and M.S.A. § 152.04.



**CRIMJIG 11.41****MURDER OF AN UNBORN CHILD IN THE THIRD  
DEGREE—DEPRAVED MIND—DEFINED**

Under Minnesota law, a person causing the death of an unborn child by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human or fetal life, but without intent to effect the death of an unborn child or anyone else, is guilty of murder in the third degree.

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**COMMENT**

M.S.A. § 609.2663.

**CRIMJIG 11.42****MURDER OF AN UNBORN CHILD IN THE THIRD  
DEGREE—DEPRAVED MIND—ELEMENTS**

The elements of murder in the third degree as alleged in this case are:

First, the death of an unborn child must be proven. An “unborn child” is the unborn offspring of a human being conceived, but not yet born. The State does not need to prove the unborn child was viable or was known to the defendant

Second, the defendant caused the death of an unborn child.

Third, the defendant’s intentional act, which caused the death of the unborn child, was eminently dangerous to others and was performed without regard for human or fetal life. Such an act may not be specifically intended to cause death, and may be without specific design on the particular person whose death occurred, but it must be committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.

Fourth, the defendant’s act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of this charge. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty of this charge.

**CRIMJIG 11.43****MANSLAUGHTER IN THE FIRST DEGREE—HEAT  
OF PASSION—DEFINED**

Under Minnesota law, a person intentionally causing the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances (providing the crying of a baby can never be sufficient provocation to result in death of the child) is guilty of manslaughter in the first degree.

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**COMMENT**

M.S.A. § 609.20(1)

In *State v. Thunberg*, 492 N.W.2d 534 (Minn. 1992), the Supreme Court upheld the use of this instruction and discouraged the trial court from making any modifications to it.



**CRIMJIG 11.44****MANSLAUGHTER IN THE FIRST DEGREE—HEAT  
OF PASSION—ELEMENTS**

The elements of manslaughter in the first degree as alleged in this case are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the defendant acted in the heat of passion with the intent (to cause the death of) (to kill) \_\_\_\_ (or \_\_\_\_)(or another person). To find the defendant had an "intent (to cause the death of a person) (to kill)," you must find that the defendant acted with the purpose of causing death, or believed that the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary that the defendant's act be premeditated. It is not an excuse that a killing is committed by a person in the heat of passion, provoked by words or acts such as would provoke a person of ordinary self-control in like circumstances. ["A person of ordinary self-control" does not include a person under the influence of intoxicants or a controlled substance.] The heat of passion may cloud a person's reason and weaken will-power, and is a circumstance the law considers in fixing the crime as manslaughter, rather than murder.

Fourth, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.20(1).

*See also* the Comment to CRIMJIG 11.05.

In *State v. Swain*, 269 N.W.2d 707, 715 (Minn. 1978), the Supreme Court held that “a mere finding that the defendant was angry, without some evidence of the victim’s acts or words, is insufficient to support a finding of ‘heat of passion’ manslaughter.”

In *State v. Schluter*, 281 N.W.2d 174 (Minn. 1979), the Supreme Court held that the instructions given by the trial court made it clear that the jury could not convict of first-degree manslaughter unless it found that the defendant had intentionally killed the victim of a shooting, and that no separate instruction on the defendant’s accident theory was necessary.

In *State v. Kelly*, 435 N.W.2d 807 (Minn. 1989), the Supreme Court held that the trial court properly refused to instruct the jury on heat of passion manslaughter in the prosecution for murder of a suspected car thief. The court held that the mere fact that someone was attempting to steal the defendant’s automobile was not sufficient provocation to support a finding of first degree manslaughter, particularly when the defendant was safely in his apartment and alerted of the possible theft by anti-theft device, and the defendant spotted the victim and his companion in the car and began shooting at them as they were running away.

**CRIMJIG 11.45**

**MANSLAUGHTER IN THE FIRST DEGREE—WHILE  
COMMITTING ASSAULT IN THE FIFTH DEGREE—  
MISDEMEANOR OR GROSS MISDEMEANOR—  
DEFINED**

Under Minnesota law, whoever, in [committing an assault in the fifth degree][or][committing or attempting to commit a misdemeanor or gross misdemeanor offense with such force and violence that the death of or great bodily harm to any person was reasonably foreseeable], causes the death of another is guilty of manslaughter in the first degree.

\_\_\_\_\_

**COMMENT**

M.S.A. § 609.20, subd. 2.



**CRIMJIG 11.46****MANSLAUGHTER IN THE FIRST DEGREE—WHILE  
COMMITTING ASSAULT IN THE FIFTH DEGREE—  
MISDEMEANOR OR GROSS MISDEMEANOR—  
ELEMENTS**

The elements of manslaughter in the first degree are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

[1] Third, the death of \_\_\_\_ was caused by the defendant committing an assault in the fifth degree. [Here the definition and elements of assault in the fifth degree should be given, drawn from the CRIMJIG instructions. See Chapter 13.] It is not necessary for the State to prove any intent on the part of the defendant to kill anyone.

[2] Third, the death of \_\_\_\_ was caused by the defendant's committing or attempting to commit the crime of \_\_\_\_\_. [Here the definition and elements of the misdemeanor or gross misdemeanor crime should be given drawn from the CRIMJIG instructions for that particular crime.] It is not necessary for the State to prove any intent on the part of the defendant to kill anyone.

Fourth, the defendant committed or attempted to commit the crime of \_\_\_\_ with such force or violence that the death of another person or great bodily harm to another person was reasonably foreseeable. "Great bodily harm" means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

[Fourth][Fifth], the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable

**doubt, the defendant is not guilty.**

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**COMMENT**

M.S.A. § 609.20, (2).

*See* M.S.A. § 609.224 (fifth degree assault) and Chapter 13 for definition and elements of fifth degree assault.

*See* also Comment to CRIMJIG 11.02.

In *State v. Parsley*, 529 N.W.2d 675 (Minn. 1995), the Supreme Court held that the misdemeanor offense of intentionally pointing a gun at another person qualifies as a predicate misdemeanor involving force or violence for a conviction of first degree involuntary manslaughter.

**CRIMJIG 11.47****MANSLAUGHTER IN THE FIRST DEGREE—  
CONTROLLED SUBSTANCES—DEFINED**

Under Minnesota law, whoever, without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a Schedule III, IV, or V controlled substance, is guilty of manslaughter in the first degree.

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**COMMENT**

M.S.A. § 609.20(4).



**CRIMJIG 11.48****MANSLAUGHTER IN THE FIRST DEGREE—  
CONTROLLED SUBSTANCES—ELEMENTS**

The elements of manslaughter in the first degree are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant was the cause of \_\_\_\_'s death, directly or indirectly, by the defendant's unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering \_\_\_\_.<sup>1</sup> "Proximately causes" means having a substantial part in bringing about the death either directly and immediately or through happenings that follow one after another.

Third, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**11.48**

<sup>1</sup>Whether or not the substance in question is a Schedule III, IV, or V

controlled substance should be determined by the court. See Chap. 20 and M.S.A. § 152.04.

**CRIMJIG 11.49**

**MANSLAUGHTER IN THE FIRST DEGREE—  
MALICIOUS PUNISHMENT OF A CHILD—DEFINED**

Under Minnesota law, whoever, in committing or attempting to commit malicious punishment of a child, causes the death of another is guilty of manslaughter in the first degree.

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COMMENT

M.S.A. § 609.20(5).

**CRIMJIG 11.50****MANSLAUGHTER IN THE FIRST DEGREE—  
MALICIOUS PUNISHMENT OF A CHILD—  
ELEMENTS**

The elements of manslaughter in the first degree are:

First, the death of \_\_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_\_.

Third, the death of \_\_\_\_\_ occurred while the defendant was committing or attempting to commit the crime of malicious punishment of a child.<sup>1</sup> [Under Minnesota law, a parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of "malicious punishment of a child."<sup>2</sup>] It is not necessary for the State to prove any intent on the part of the defendant to kill anyone.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.20(5).

See CRIMJIGs 13.30 and 13.31 for further definition and elements of the crime of malicious punishment of a child.

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**11.50**

<sup>1</sup>See CRIMJIGs 13.84 and 13.85 for further definition and elements of

the crime of malicious punishment of a child.

<sup>2</sup>See M.S.A. § 609.337.



**CRIMJIG 11.51****MANSLAUGHTER IN THE FIRST DEGREE—  
MALICIOUS PUNISHMENT OF A CHILD—  
ELEMENTS**

The elements of manslaughter in the first degree are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_.

Third, the death of \_\_\_\_ occurred while the defendant was committing or attempting to commit the crime of malicious punishment of a child.<sup>1</sup> [Under Minnesota law, a parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of "malicious punishment of a child."<sup>2</sup>] It is not necessary for the State to prove any intent on the part of the defendant to kill anyone.

Fourth, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.20(5).

See CRIMJIGs 13.30 and 13.31 for further definition and elements of the crime of malicious punishment of a child.

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**11.51**

<sup>1</sup>See CRIMJIGs 13.84 and 13.85 for further definition and elements of

the crime of malicious punishment of a child.

<sup>2</sup>See M.S.A. § 609.337.

**CRIMJIG 11.52****MANSLAUGHTER OF AN UNBORN CHILD IN THE FIRST DEGREE—HEAT OF PASSION—ELEMENTS**

The elements of manslaughter of an unborn child in the first degree are:

First, the death of an unborn child must be proven. An “unborn child” is the offspring of a human being conceived, but not yet born.

Second, the defendant caused the death of an unborn child.

Third, the defendant acted in the heat of passion with the intent to effect the death of the unborn child (or \_\_\_\_)(or another person). To find the defendant had an “intent to effect the death,” you must find that the defendant acted with the purpose of causing death or believed that the act would have that result. Intent, being a process of the mind, is not always susceptible to proof by direct evidence, but may be inferred from all the circumstances surrounding the event. It is not necessary that the defendant’s act be premeditated. It is not an excuse that a killing is committed by a person in the heat of passion, provoked by words or acts such as would provoke a person of ordinary self-control in like circumstances. [“A person of ordinary self-control” does not include a person under the influence of intoxicants or a controlled substance.] The heat of passion may cloud a person’s reason and weaken will-power, and is a circumstance that the law considers in fixing the crime as manslaughter.

Fourth, the defendant’s act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 11.53****MANSLAUGHTER OF AN UNBORN CHILD IN THE  
FIRST DEGREE—WHILE COMMITTING  
MISDEMEANOR OR GROSS MISDEMEANOR—  
DEFINED**

Under Minnesota law, whoever, while committing or attempting to commit a misdemeanor or gross misdemeanor offense with such force and violence that the death of or great bodily harm to any person or unborn child was reasonably foreseeable, causes the death of an unborn child is guilty of manslaughter of an unborn child in the first degree.

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**COMMENT**

M.S.A. § 609.2664(2).



**CRIMJIG 11.54****MANSLAUGHTER OF AN UNBORN CHILD IN THE  
FIRST DEGREE—WHILE COMMITTING  
MISDEMEANOR OR GROSS MISDEMEANOR—  
ELEMENTS**

The elements of manslaughter of an unborn child in the first degree are:

First, the death of an unborn child must be proven. An “unborn child” is the offspring of a human being conceived, but not yet born.

Second, the defendant caused the death of the unborn child.

Third, the death of the unborn child was caused by the defendant’s committing or attempting to commit the crime of \_\_\_\_\_. [The definition and elements of the misdemeanor or gross misdemeanor crime should be given, drawn from the instructions for that particular crime.] It is not necessary for the State to prove any intent on the part of the defendant to kill anyone.

Fourth, the defendant committed or attempted to commit the crime of \_\_\_\_\_ with such force or violence that the death of an unborn child or another person or great bodily harm to an unborn child or another person was reasonably foreseeable. (“Great bodily harm” means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.)

Fifth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

The defendant is not charged with the crime of \_\_\_\_\_. The

explanation of that crime is given to you only as a part of the explanation of the elements of manslaughter in the first degree.

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COMMENT

*See Comment to CRIMJIG 11.02.*

**CRIMJIG 11.55**

**MANSLAUGHTER IN THE SECOND DEGREE—  
DEFINED**

Under Minnesota law, whoever,

[1] by culpable negligence, whereby (he)(she) creates an unreasonable risk and consciously takes the chance of causing death or great bodily harm to another person,

[2] by shooting another person with a firearm or other dangerous weapon, negligently believing the person to be a deer or other animal,

[3] by setting a (spring gun)(pit fall)(deadfall)(snare) or other similar dangerous weapon or device,

[4] by negligently or intentionally permitting any animal, known by the person to have vicious propensities or to have caused great or substantial bodily harm in the past, to run uncontrolled off the owner's premises, or by negligently failing to keep it properly confined,

causes the death of another is guilty of manslaughter in the second degree.

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COMMENT

M.S.A. § 609.205.



**CRIMJIG 11.56****MANSLAUGHTER IN THE SECOND DEGREE—  
ELEMENTS**

The elements of manslaughter in the second degree are:

First, the death of \_\_\_\_ must be proven.

[1] Second, the defendant caused the death of \_\_\_\_, by culpable negligence, whereby the defendant created an unreasonable risk and consciously took a chance of causing death or great bodily harm. "Culpable negligence" is intentional conduct that the defendant may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others. "Great bodily harm" means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

[2] Second, the defendant, negligently believing \_\_\_\_ to be a deer or other animal, caused the death of \_\_\_\_ by shooting with a firearm (or other dangerous weapon). (A "dangerous weapon" includes any device designed as a weapon and capable of producing death or great bodily harm or any other device that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.) The term "negligence" means doing something that a reasonable person would not do, or the failure to do something that a reasonable person would do under like circumstances.

[3] Second, the defendant caused the death of \_\_\_\_ by setting a (spring gun)(pit fall)(deadfall)(snare) or other similar dangerous weapon or device.

[4] Second, the defendant, by negligently or intentionally permitting a \_\_\_\_, (an animal) known by the defendant to have vicious propensities, or to have caused great or substantial bodily harm in the past, to run uncontrolled off the owner's premises, or by negligently failing to keep the \_\_\_\_ (animal) properly confined, caused the death of \_\_\_\_\_. This element is not

proven if you find by a greater weight of the evidence that \_\_\_\_ (the victim) provoked the animal to cause \_\_\_\_'s (the victim's) death.

Third, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.205(1–4).

As to the definition of dangerous weapon, see M.S.A. § 609.02 subd. 6 (dangerous weapon); M.S.A. § 609.668, subd. 1 (explosive or incendiary device). *See also* the Comment to CRIMJIG 13.10.

Contributory negligence of the decedent is not a defense, except under clause 4. It is relevant on the issues of whether the defendant was negligent and whether that negligence was the proximate cause of the victim's injury. *State v. Schaub*, 231 Minn. 512, 44 N.W.2d 61 (1950); *State v. King*, 367 N.W.2d 599 (Minn. App. 1985).

In *State v. Landherr*, 542 N.W.2d 686 (Minn. App. 1996), the defendant was charged with attempted manslaughter for the reckless discharge of a firearm. The Court of Appeals held that any an individual who discharges a firearm and injures a person, who does not die, may not be charged with nor convicted of attempted manslaughter in the second degree.

The definition of culpable negligence is drawn from *State v. Frost*, 342 N.W.2d 317 (Minn. 1983) and *State v. Munnell*, 344 N.W.2d 883 (Minn. App. 1984). In *State v. Frost*, the Supreme Court upheld the trial court's definition of culpable negligence as follows:

Culpable negligence is more than ordinary negligence. It is more than gross negligence. It is gross negligence coupled with an element of recklessness. It is intentional conduct which the actor may not intend to be harmful, but which an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others.

*Frost*, 342 N.W.2d at 320.

A stabbing may be culpable negligence. *State v. Spann*, 289 Minn. 497, 182 N.W.2d 873 (1970).

M.S.A. § 609.205 is not unconstitutionally vague or overbroad. *State v. Crace*, 289 N.W.2d 54 (Minn.1979).



**CRIMJIG 11.57**

**MANSLAUGHTER IN THE SECOND DEGREE—  
CHILD NEGLECT OR ENDANGERMENT—DEFINED**

Under Minnesota law, whoever, in committing or attempting to commit child endangerment or neglect, causes the death of another is guilty of manslaughter in the second degree.

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**COMMENT**

M.S.A. § 609.205(5).

**CRIMJIG 11.58****MANSLAUGHTER IN THE SECOND DEGREE—  
CHILD NEGLECT OR ENDANGERMENT—  
ELEMENTS**

The elements of manslaughter in the second degree are:

First, the death of \_\_\_\_\_ must be proven.

Second, the defendant caused the death of \_\_\_\_\_.

Third, the death of \_\_\_\_\_ was caused by the defendant's committing or attempting to commit the crime of child neglect or endangerment. ["Child neglect"] ["Child endangerment"] is defined as [Give the appropriate CRIMJIGs from Chapter 13 on child neglect or endangerment.] It is not necessary for the State to prove any intent on the part of the defendant to kill anyone.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See CRIMJIGs 13.84 through 13.97 for further definitions and elements of the crime of child neglect and endangerment.

**CRIMJIG 11.59****MANSLAUGHTER OF AN UNBORN CHILD IN THE  
SECOND DEGREE—DEFINED**

Under Minnesota law, whoever,

[1] by culpable negligence, whereby (he)(she) creates an unreasonable risk and consciously takes chances of causing death or great bodily harm to an unborn child or another person,

[2] by shooting the mother of the unborn child with a firearm or other dangerous weapon, negligently believing her to be a deer or other animal,

[3] by setting a (spring gun)(pit fall)(deadfall)(snare) or other similar dangerous weapon or device,

[4] by negligently or intentionally permitting any animal, known by the person to have vicious propensities or to have caused great or substantial bodily harm in the past, to run uncontrolled off the owner's premises, or by negligently failing to keep it properly confined,

causes the death of an unborn child is guilty of manslaughter of an unborn child in the second degree.

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**COMMENT**

M.S.A. § 609.2665.



**CRIMJIG 11.60****MANSLAUGHTER OF AN UNBORN CHILD IN THE  
SECOND DEGREE—ELEMENTS**

The elements of manslaughter of an unborn child in the second degree are:

First, the death of an unborn child must be proven. An "unborn child" is the unborn offspring of a human being conceived, but not yet born.

Second,

[1] the defendant caused the death of the unborn child by culpable negligence whereby the defendant created an unreasonable risk and consciously took a chance of causing death or great bodily harm. "Culpable negligence" is intentional conduct that the defendant may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others. "Great bodily harm" means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

[2] the defendant caused the death of the unborn child by shooting its mother with a firearm (or other dangerous weapon), negligently believing her to be a deer or other animal. (A "dangerous weapon" includes any device designed as a weapon and capable of producing death or great bodily harm, or any other device that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.) The term "negligence" means the doing of something that a reasonable person would not do, or the failure to do something that a reasonable person would do under like circumstances.

[3] the defendant caused the death of the unborn child by setting a (spring gun)(pit fall)(deadfall)(snare) or other similar dangerous weapon or device.

[4] the defendant caused the death of the unborn child by negligently or intentionally permitting (a \_\_\_\_\_)(an animal), known by defendant to have vicious propensities, or to have caused great or substantial bodily harm in the past, to run uncontrolled off the owner's premises, or by negligently failing to keep the (\_\_\_\_\_) (animal) properly confined. This element is not proven if you find by a greater weight of the evidence that the unborn child's mother provoked the (\_\_\_\_\_) (animal) to cause the unborn child's death. The term "negligence" means the doing of something a reasonable person would not do, or the failure to do something a reasonable person would do under like circumstances.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 11.61****CRIMINAL VEHICULAR HOMICIDE—DEFINED**

Under Minnesota law, whoever operates a motor vehicle (in a grossly negligent manner)(in a negligent manner while under the influence of alcohol or a controlled substance or any combination of those elements)(while having an alcohol concentration of 0.08 or more)(while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving)(in a negligent manner while knowingly under the influence of a hazardous substance)(in a negligent manner while any amount of \_\_\_\_\_ is present in the person's body) and thereby causes the death of a human being is guilty of criminal vehicular homicide.

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**COMMENT**

M.S.A. § 609.21, subd. 1(1) to (6).



**CRIMJIG 11.62****CRIMINAL VEHICULAR HOMICIDE—ELEMENTS**

The elements of criminal vehicular homicide are:

First, the death of \_\_\_\_ must be proven.

Second, the defendant caused<sup>1</sup> the death of \_\_\_\_ by operating a motor vehicle

[1] in a grossly negligent manner. "In a grossly negligent manner" means with very great negligence or without even scant care.

[2] in a negligent manner while under the influence of (alcohol)(or)(a controlled substance)(or a combination of those elements). "In a negligent manner" means without using ordinary or reasonable care. "While under the influence of (alcohol)(or)(a controlled substance)(or a combination of those elements)" means when the ability or capacity to operate was impaired by (alcohol)(or)(a controlled substance)(or a combination of both elements).

[3] while having an alcohol concentration of 0.08 or more. "While having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more)(the number of grams of alcohol per 210 liters of breath is 0.08 or more)(the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[4] while having an alcohol concentration of 0.08 or more as measured within two hours of the time of driving. "While having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of

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**11.62**

<sup>1</sup>See CRIMJIG 3.31 for a definition of causation that will cover most cases. A more complete definition or explanation of causation and negli-

gence could be given in certain cases. This might include all or parts of the appropriate Civil Jury Instruction Guides.

alcohol per 100 milliliters of blood is 0.08 or more)(the number of grams of alcohol per 210 liters of breath is 0.08 or more)(the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[5] in a negligent manner while knowingly under the influence of a hazardous substance. "In a negligent manner" means to operate without using ordinary or reasonable care. "Under the influence of a hazardous substance" means operating the motor vehicle when ability or capacity to operate was impaired by \_\_\_\_\_, which is a hazardous substance.

[6] in a negligent manner while any amount of \_\_\_\_\_ is present in the person's system. "In a negligent manner" means to operate without using ordinary or reasonable care. The State does not have to prove the defendant was under the influence of the controlled substance.

A "motor vehicle" is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water, or in the air. The term "motor vehicle" also includes attached trailers.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.21, subd. 1(1) to (6).

M.S.A. § 169.01, subd. 61, defines "alcohol concentration."

The definition of "gross negligence" is taken from *State v. Meany*, 262 Minn. 491, 115 N.W.2d 247 (1962). Although that case interpreted an earlier statute, it is clear that the term "grossly negligent" was used in the same sense in the 1963 revision. Gross negligence requires no conscious and intentional action that the actor knows or should know



creates an unreasonable risk of harm to others. *State v. Brehmer*, 281 Minn. 156, 160 N.W.2d 669 (1968).

The definition of “operating while under the influence” is taken from *Anderson v. State*, 305 N.W.2d 786 (Minn. 1981).

See CRIMJIG 3.31 for the instruction on Causation. A more complete definition or explanation of negligence could be given in certain cases. This might include all or parts of the appropriate Civil Jury Instruction Guides. For further discussion of “cause” and causation, see *State v. Jaworsky*, 505 N.W.2d 638 (Minn. App. 1993).

Because careless driving is a lesser-included offense, involving ordinary negligence, of criminal vehicular homicide, which involves gross negligence, it may be reversible error not to submit the lesser-included offense when instructing the jury. The Supreme Court held, in *State v. Al-Naseer*, 690 N.W.2d 744 (Minn. 2005), relying on its holding in *State v. Nystrom*, 596 N.W.2d 256 (Minn. 1999), that “[a] trial court must submit an instruction on a lesser offense when 1) the offense in question is an “included” offense; and 2) a rational basis exists for the jury to convict the defendant of the lesser offense and acquit him of the greater crime.” See Comment to CRIMJIG 3.20 and *State v. Dahlin*, 695, N.W.2d 588 (Minn. 2005) on the issue of instructing on lesser-included offenses.

In *State v. Munnell*, 344 N.W.2d 883 (Minn. App. 1984), the Court of Appeals rejected a constitutional challenge to M.S.A. § 609.21, subd. 1. Appellant claimed that the statute was unconstitutionally vague, in that it did not give the public adequate notice of the degree of negligence required to subject a driver who is under the influence for prosecution under the statute. Appellant further argued that the statute was overbroad and violated the Equal Protection Clause, because it “lumps together and treats equally those defendants whose negligence was the greatest cause of the death of a human being and those defendants whose negligence was only a minor contributing cause of death”, and contended such a classification was arbitrary and irrational, since it would hold a person criminally liable for action that would not result in civil liability. The Court of Appeals rejected both arguments and held that the use of a negligence standard to impose criminal liability was constitutional. The Court held that it was not unconstitutional to impose criminal liability on a defendant in a case in which the defendant would not face civil liability, because the decedent’s degree of negligence exceeded the defendant’s.

In *State v. Munnell*, *supra*, the trial court properly refused to instruct the jury that the fault of the victim was a defense to M.S.A. § 609.21, subd. 1. However, the Court of Appeals held that the fault of the victim was relevant on the questions of whether the defendant was negligent, and, if so, whether that negligence was the proximate cause of the victim’s injuries. In *State v. Nelson*, 806 N.W.2d 588 (Minn. App. 2011) the Court of Appeals held the victim’s intoxication from consump-



tion of alcoholic beverages was relevant to the issue of determining whether defendant's operation of motor vehicle after consuming alcoholic beverages was proximate cause of victim's death;

In *State v. Nelson*, 806 N.W.2d 588 (Minn. App. 2011) the Court of Appeals held, in a case involving two intoxicated operators of separate motor vehicles, that when the negligent conduct of two drivers intertwines to cause the death of one, the district court's instruction must define causation so the jury is informed that to find defendant guilty it must find that the defendant's conduct played a substantial part in bringing about the death or injury of the victim-driver. A more complete definition or explanation of negligence could be given in certain cases. This might include all or parts of the appropriate Civil Jury Instruction Guides.

In *State v. Miller*, 471 N.W.2d 380 (Minn. App. 1991), the Court of Appeals dismissed an indictment charging criminal vehicular operation resulting in death, and held that evidence that the driver failed to inspect a truck's brakes in violation of a civil statute was insufficient by itself to support a charge of criminal vehicular operation resulting in death, and held that proof of additional improper driving conduct was required. But now see M.S.A. § 609.21, subd. 1(8) and subd. 1a(a).

In *State v. Hegstrom*, 543 N.W.2d 698 (Minn. App. 1996), the Court of Appeals reversed a pretrial order dismissing the charge of criminal vehicular homicide, based upon a charge of gross negligence. The Court held that gross negligence does not require willful and wanton disregard or reckless conduct. The Court held that a sufficient degree of inattention to the road could constitute a lack of "slight care" that constitutes gross negligence. The Court held that driver inattention is one factor the jury may consider in determining gross negligence.

In *State v. Kissner*, 541 N.W.2d 317 (Minn. App. 1995), the Court of Appeals rejected the claim that the trial court erroneously defined the term "gross negligence," and noted the instruction used by the trial court conformed to CRIMJIG 11.63 (then 11.26).

In *State v. Stark*, 363 N.W.2d 53 (Minn. 1985), the Supreme Court approved a detailed jury instruction on driving under the influence of alcohol.

**CRIMJIG 11.63****CRIMINAL VEHICULAR HOMICIDE LEAVING THE  
SCENE—DEATH—DEFINED**

Under Minnesota law, whoever operates a motor vehicle and causes a collision resulting in the death of a human being and then leaves the scene of the collision without stopping as close to the scene as possible to reasonably investigate what was struck and providing any required information to law enforcement by the quickest means of communication is guilty of criminal vehicular homicide.

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**COMMENT**

M.S.A. § 609.21, subd. 1(7).

**CRIMJIG 11.64****CRIMINAL VEHICULAR HOMICIDE LEAVING THE  
SCENE—DEATH—ELEMENTS**

The elements of criminal vehicular homicide are:

First, the defendant operated a motor vehicle. A “motor vehicle” is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on lands, rails, water, or in the air. The term “motor vehicle” also includes attached trailers.

Second, the defendant caused a collision. “Caused a collision” may mean directly or immediately, or through a series of happenings that followed one after another.

[1] Third, the defendant knew the accident involved (injury to another) (death of a human being).

[2] Third, the defendant failed to stop as close as possible to the scene to reasonably investigate what was struck in the collision.

[1] Fourth, the defendant failed to give or show identification at the scene of the accident.

[2] Fourth, the defendant failed to give notice of the accident by the quickest means of communication to law enforcement.

Fifth, the death of \_\_\_\_ (victim) (an unborn child) occurred as a result of the collision. (An “unborn child” is the offspring of a human being conceived but not yet born.)

Sixth, the defendant’s act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



**[THIS IS BASED ON MINN. STAT. 609.2112, subd. 1(7) and 169.09, subds. 1 and 6]**

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**COMMENT**

M.S.A. § 609.2112, subd. 1(7) (formerly M.S.A. § 609.21, subd. 1(7)); M.S.A. 169.09, subds. 1 and 6.

The “mens rea” requirement for this offense, that defendant knew the accident was of a type involving injury to a person or damage to another vehicle (See M.S.A. 169.09), was set out by the Supreme Court in *State v. Al-Naseer*, 634 N.W.2d 679 (Minn. 2007).

**CRIMJIG 11.65****CRIMINAL VEHICULAR OPERATION RESULTING  
IN DEATH OF AN UNBORN CHILD—DEFINED**

Under Minnesota law, whoever operates a motor vehicle (in a grossly negligent manner)(in a negligent manner while under the influence of alcohol or a controlled substance or any combination of those elements)(while having an alcohol concentration of 0.08 or more)(while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving)(in a negligent manner while knowingly under the influence of a hazardous substance)(in a negligent manner while any amount of \_\_\_\_<sup>1</sup> is present in the person's body), and thereby causes the death of an unborn child, is guilty of criminal vehicular operation.

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**COMMENT**

M.S.A. § 609.2114, subd. 1 (formerly M.S.A. 609.21, subd. 3(1) to (6)).

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**11.65**

<sup>1</sup>A controlled substance listed in

Schedule I or II, other than marijuana or tetrahydrocannabinols.

**CRIMJIG 11.66****CRIMINAL VEHICULAR OPERATION RESULTING  
IN DEATH OF AN UNBORN CHILD—ELEMENTS**

The elements of criminal vehicular operation are:

First, the death of an unborn child must be proven. An “unborn child” is the offspring of a human being conceived but not yet born.

Second, the defendant caused the death of \_\_\_\_ by operating a motor vehicle

[1] in a grossly negligent manner. “Grossly negligent” means with very great negligence or without even scant care.

[2] in a negligent manner while under the influence of (alcohol)(or)(a controlled substance)(or a combination of those elements). “In a negligent manner” means without using ordinary or reasonable care. “While under the influence of (alcohol)(or)(a controlled substance)(or a combination of those elements)” means when ability or capacity to operate was impaired by (alcohol)(or)(a controlled substance)(or a combination of both elements).

[3] while having an alcohol concentration of 0.08 or more. “While having an alcohol concentration of 0.08 or more” means while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more)(the number of grams of alcohol per 210 liters of breath is 0.08 or more)(the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[4] while having an alcohol concentration of 0.08 or more as measured within two hours of the time of driving. “While having an alcohol concentration of 0.08 or more” means while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more)(the number of grams of alcohol per 210 liters of breath is 0.08 or more)(the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).



[5] in a negligent manner while knowingly under the influence of a hazardous substance. "In a negligent manner" means without using ordinary or reasonable care. "Under the influence of a hazardous substance" means when ability or capacity to operate was impaired by \_\_\_\_\_,<sup>1</sup> which is classified as a hazardous substance.

[6] in a negligent manner while any amount of \_\_\_\_\_<sup>2</sup> is present in the person's system. "In a negligent manner" means without using ordinary or reasonable care. The State does not have to prove the defendant was under the influence of the controlled substance.

A "motor vehicle" is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water or in the air. The term "motor vehicle" also includes attached trailers.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**11.66**

<sup>1</sup>M.S.A § 609.21, subd. 5, defines a "hazardous substance" as any chemical or chemical compound that is listed as a hazardous substance in rules adopted under chapter 182. Through a

series of further references, one can find the list of hazardous substances at 49 C.F.R. § 172.101, Appendix A.

<sup>2</sup>A controlled substance listed in Schedule I or II, other than marijuana or tetrahydrocannabinols.

## CRIMJIG 11.67

CRIMINAL VEHICULAR OPERATION RESULTING  
IN GREAT BODILY HARM—DEFINED

Under Minnesota law, whoever operates a motor vehicle (in a grossly negligent manner) (in a negligent manner while under the influence of alcohol or a controlled substance or any combination of those elements) (while having an alcohol concentration of 0.08 or more) (while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving) (in a negligent manner while knowingly under the influence of a hazardous substance) (in a negligent manner while any amount of \_\_\_\_\_<sup>1</sup> is present in the person's body) and thereby causes great bodily harm to another, is guilty of a crime.

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COMMENT

M.S.A. § 609.2113, subd. 1(1) to (6) (formerly M.S.A. § 609.21, subd. 2(1) to (6)).

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**11.67**

<sup>1</sup>A controlled substance listed in

Schedule I or II, other than marijuana or tetrahydrocannabinols.

**CRIMJIG 11.68****CRIMINAL VEHICULAR OPERATION RESULTING  
IN GREAT BODILY HARM—ELEMENTS**

The elements of criminal vehicular operation are:

First, the defendant operated a motor vehicle

[1] in a grossly negligent manner. "Grossly negligent" means with very great negligence or without even scant care.

[2] in a negligent manner while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements). "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Operating a motor vehicle while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements)" means operating the motor vehicle when ability or capacity to operate was impaired by (alcohol) (or) (a controlled substance) (or a combination of both elements).

[3] while having an alcohol concentration of 0.08 or more. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[4] while having an alcohol concentration of 0.08 or more as measured within two hours of the time of driving. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[5] in a negligent manner while knowingly under the influ-



ence of a hazardous substance. "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Under the influence of a hazardous substance" means operating the motor vehicle when ability or capacity to operate was impaired by \_\_\_\_\_,<sup>1</sup> which is a hazardous substance.

[6] in a negligent manner while any amount of \_\_\_\_\_<sup>2</sup> is present in the person's system. The State does not have to prove the defendant was under the influence of the controlled substance. "Operating in a negligent manner" means to operate without using ordinary or reasonable care.

A motor vehicle is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water or in the air.

Second, such operation of the motor vehicle caused great bodily harm to \_\_\_\_\_. "Great bodily harm" means bodily harm that creates a high probability of death, or causes a permanent or protracted loss or impairment of the function of any part of the body or other serious bodily harm.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.2113, subd 1(1) to (6) (formerly M.S.A. § 609.21, subd. 2(1) to (6)).

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#### 11.68

<sup>1</sup>M.S.A § 609.21, subd. 5, defines a "hazardous substance" as any chemical or chemical compound that is listed as a hazardous substance in rules adopted under chapter 182. Through a

series of further references, one can find the list of hazardous substances at 49 C.F.R. § 172.101, Appendix A.

<sup>2</sup>A controlled substance listed in Schedule I or II, other than marijuana or tetrahydrocannabinols.

M.S.A. § 169.01, subd. 61, defines “alcohol concentration.”

For a discussion of “gross negligence” in criminal vehicular offenses see *State v. Al-Naseer*, 690 N.W.2d 744 (Minn. 2005).

For further discussion of “cause” and causation, see *State v. Jaworsky*, 505 N.W.2d 638 (Minn. App. 1993). See CRIMJIG 3.31.

The definition of “gross negligence” is taken from *State v. Meany*, 262 Minn. 491, 115 N.W.2d 247 (1962). Although that case interpreted an earlier statute, it is clear that the term “grossly negligent” was used in the same sense in the 1963 revision. “Gross negligence” requires no conscious and intentional action that the actor knows or should know creates an unreasonable risk of harm to others. *State v. Brehmer*, 281 Minn. 156, 160 N.W.2d 669 (1968).

The definition of “operating while under the influence” is taken from *Anderson v. State*, 305 N.W.2d 786 (Minn. 1981).

A more complete definition or explanation of negligence could be given in certain cases. This might include all or parts of the appropriate Civil Jury Instruction Guides.

**CRIMJIG 11.69****CRIMINAL VEHICULAR OPERATION RESULTING  
IN GREAT BODILY HARM TO AN UNBORN CHILD—  
DEFINED**

Under Minnesota law, whoever operates a motor vehicle (in a grossly negligent manner) (in a negligent manner while under the influence of alcohol or a controlled substance or any combination of those elements) (while having an alcohol concentration of 0.08 or more) (while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving) (in a negligent manner while knowingly under the influence of a hazardous substance) (in a negligent manner while any amount of \_\_\_\_\_<sup>1</sup> is present in the person's body) and thereby causes great bodily harm to an unborn child, who is subsequently born alive, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2114, subd. 2(1) to (6) (formerly M.S.A. § 609.21, subd. 4(1) to (6)).

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**11.69**

<sup>1</sup>A controlled substance listed in

Schedule I or II, other than marijuana or tetrahydrocannabinols.



**CRIMJIG 11.70****CRIMINAL VEHICULAR OPERATION RESULTING  
IN GREAT BODILY HARM TO AN UNBORN CHILD—  
ELEMENTS**

The elements of criminal vehicular operation are:

First, the defendant operated a motor vehicle

[1] in a grossly negligent manner. "Grossly negligent" means with very great negligence or without even scant care.

[2] in a negligent manner while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements). "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Operating a motor vehicle while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements)" means operating the motor vehicle when ability or capacity to operate was impaired by (alcohol) (or) (a controlled substance) (or a combination of both elements).

[3] while having an alcohol concentration of 0.08 or more. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[4] while having an alcohol concentration of 0.08 or more as measured within two hours of the time of driving. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[5] in a negligent manner while knowingly under the influence of a hazardous substance. "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Under the influence of a hazardous substance" means operating the motor vehicle when ability or capacity to operate was impaired by \_\_\_\_\_,<sup>1</sup> which is classified as a hazardous substance.

[6] in a negligent manner while any amount of \_\_\_\_\_<sup>2</sup> is present in the person's system. \_\_\_\_\_ is classified as a Schedule I or II controlled substance. The State does not have to prove the defendant was under the influence of the controlled substance. "Operating in a negligent manner" means to operate without using ordinary or reasonable care.

A motor vehicle is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water or in the air.

Second, such operation of the motor vehicle caused great bodily harm to an unborn child, who was subsequently born alive. "Great bodily harm" means bodily harm that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss of impairment of the function of any part of the body or other serious bodily harm. An unborn child means the unborn offspring of a human being conceived, but not yet born.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find \_\_\_\_\_

#### 11.70

<sup>1</sup>M.S.A § 609.21, subd. 5, defines a "hazardous substance" as any chemical or chemical compound that is listed as a hazardous substance in rules adopted under chapter 182. Through a

series of further references, one can find the list of hazardous substances at 49 C.F.R. § 172.101, Appendix A.

<sup>2</sup>A controlled substance listed in Schedule I or II, other than marijuana or tetrahydrocannabinols.

that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



## CRIMJIG 11.71

### CRIMINAL VEHICULAR OPERATION RESULTING IN SUBSTANTIAL BODILY HARM—DEFINED

Under Minnesota law, whoever operates a motor vehicle (in a grossly negligent manner) (in a negligent manner while under the influence of alcohol or a controlled substance or any combination of those elements) (while having an alcohol concentration of 0.08 or more) (while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving) (in a negligent manner while knowingly under the influence of a hazardous substance) (in a negligent manner while any amount of \_\_\_\_\_<sup>1</sup> is present in the person's body) and thereby causes substantial bodily harm to another, is guilty of a crime.

#### COMMENT

M.S.A. § 609.2113, Subd. 2(1) to (6) (formerly M.S.A. § 609.21, subd. 2a(1) to (6)).

#### 11.71

<sup>1</sup>A controlled substance listed in

Schedule I or II, other than marijuana or tetrahydrocannabinols.

**CRIMJIG 11.72****CRIMINAL VEHICULAR OPERATION RESULTING  
IN SUBSTANTIAL BODILY HARM—ELEMENTS**

The elements of criminal vehicular operation are:

First, the defendant operated a motor vehicle

[1] in a grossly negligent manner. "Grossly negligent" means with very great negligence or without even scant care.

[2] in a negligent manner while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements). "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Operating a motor vehicle while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements)" means operating the motor vehicle when ability or capacity to operate was impaired by (alcohol) (or) (a controlled substance) (or a combination of both elements).

[3] while having an alcohol concentration of 0.08 or more. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[4] while having an alcohol concentration of 0.08 or more as measured within two hours of the time of driving. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[5] in a negligent manner while knowingly under the influ-

ence of a hazardous substance. "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Under the influence of a hazardous substance" means operating the motor vehicle when ability or capacity to operate was impaired by \_\_\_\_\_,<sup>1</sup> which is a hazardous substance.

[6] in a negligent manner while any amount of \_\_\_\_\_<sup>2</sup> is present in the person's system. The State does not have to prove the defendant was under the influence of the controlled substance. "Operating in a negligent manner" means to operate without using ordinary or reasonable care.

A motor vehicle is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water or in the air.

Second, such operation of the motor vehicle caused substantial bodily harm to \_\_\_\_\_. "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, or causes temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

See Comment to CRIMJIG 11.68.

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#### 11.72

<sup>1</sup>M.S.A § 609.21, subd. 5, defines a "hazardous substance" as any chemical or chemical compound that is listed as a hazardous substance in rules adopted under chapter 182. Through a

series of further references, one can find the list of hazardous substances at 49 C.F.R. § 172.101, Appendix A.

<sup>2</sup>A controlled substance listed in Schedule I or II, other than marijuana or tetrahydrocannabinols.



**CRIMJIG 11.73**

**CRIMINAL VEHICULAR OPERATION RESULTING  
IN BODILY HARM—DEFINED**

Under Minnesota law, whoever operates a motor vehicle (in a grossly negligent manner) (in a negligent manner while under the influence of alcohol or a controlled substance or any combination of those elements) (while having an alcohol concentration of 0.08 or more) (while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving) (in a negligent manner while knowingly under the influence of a hazardous substance) (in a negligent manner while any amount of \_\_\_\_\_<sup>1</sup> is present in the person's body) and thereby causes bodily harm to another, is guilty of a crime.

COMMENT

M.S.A. § 609.2113, subd. 3(1) to (6) (formerly M.S.A. § 609.21, subd. 2b(1) to (6)).

**11.73**

<sup>1</sup>A controlled substance listed in

Schedule I or II, other than marijuana or tetrahydrocannabinols.

**CRIMJIG 11.74****CRIMINAL VEHICULAR OPERATION RESULTING  
IN BODILY HARM—ELEMENTS**

The elements of criminal vehicular operation are:

First, the defendant operated a motor vehicle

[1] in a grossly negligent manner. "Grossly negligent" means with very great negligence or without even scant care.

[2] in a negligent manner while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements). "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Operating a motor vehicle while under the influence of (alcohol) (or) (a controlled substance) (or a combination of those elements)" means operating the motor vehicle when ability or capacity to operate was impaired by (alcohol) (or) (a controlled substance) (or a combination of both elements).

[3] while having an alcohol concentration of 0.08 or more. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[4] while having an alcohol concentration of 0.08 or more as measured within two hours of the time of driving. "Operating a motor vehicle while having an alcohol concentration of 0.08 or more" means operating the motor vehicle while (the number of grams of alcohol per 100 milliliters of blood is 0.08 or more) (the number of grams of alcohol per 210 liters of breath is 0.08 or more) (the number of grams of alcohol per 67 milliliters of urine is 0.08 or more).

[5] in a negligent manner while knowingly under the influ-

ence of a hazardous substance. "Operating a motor vehicle in a negligent manner" means to operate without using ordinary or reasonable care. "Under the influence of a hazardous substance" means operating the motor vehicle when ability or capacity to operate was impaired by \_\_\_\_\_,<sup>1</sup> which is a hazardous substance.

[6] in a negligent manner while any amount of \_\_\_\_\_<sup>2</sup> is present in the person's system. The State does not have to prove the defendant was under the influence of the controlled substance. "Operating in a negligent manner" means to operate without using ordinary or reasonable care.

A motor vehicle is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on land, rails, water or in the air.

Second, such operation of the motor vehicle caused bodily harm to \_\_\_\_\_. "Bodily harm" means physical pain or injury, illness or any impairment of physical condition.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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11.74

<sup>1</sup>M.S.A § 609.21, subd. 5, defines a "hazardous substance" as any chemical or chemical compound that is listed as a hazardous substance in rules adopted under chapter 182. Through a

series of further references, one can find the list of hazardous substances at 49 C.F.R. § 172.101, Appendix A

<sup>2</sup>A controlled substance listed in Schedule I or II, other than marijuana or tetrahydrocannabinols.



**CRIMJIG 11.75****CRIMINAL VEHICULAR OPERATION—LEAVING  
THE SCENE—GREAT BODILY HARM,  
SUBSTANTIAL BODILY HARM, BODILY HARM—  
DEFINED**

Under Minnesota law, the driver of a motor vehicle who causes a collision resulting in bodily harm to any person and knows the collision resulted in injury (to another) (to an unborn child subsequently born alive) and who does not (stop and remain at the scene of the accident or as close to the collision as possible and investigate what was struck) (identify (himself) (herself) at the scene of the accident) (quickly notify authorities of the accident), is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2113, subd 1(7), subd. 2(7), subd. 3(7); M.S.A. § 609.2114, subd. 1(7).

*See* M.S.A. § 169.09, subds. 1 and 6 for the crime of leaving the scene of an accident.

**CRIMJIG 11.76****CRIMINAL VEHICULAR OPERATION—LEAVING  
THE SCENE—GREAT BODILY HARM,  
SUBSTANTIAL BODILY HARM, BODILY HARM—  
ELEMENTS**

The elements of failure to remain at the scene of a collision are:

First, the defendant operated a motor vehicle. A "motor vehicle" is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on lands, rails, water, or in the air. The term "motor vehicle" also includes attached trailers.

Second, the defendant was involved in a collision.

Third, the defendant's driving caused the accident (either directly or immediately or through a series of happenings that followed one after the other).

Fourth, the defendant knew or had reason to know the collision involved injury to a person.

[1] Fifth, the defendant failed to stop the vehicle at the scene of the accident or as close as possible to the scene and reasonably investigate what was struck.

[2] Fifth, the defendant failed to give or show identification at the scene of the accident.

[3] Fifth, the defendant failed to give notice of the accident by the quickest means of communication to law enforcement authorities.

[A] Sixth, \_\_\_\_\_ (the victim) (an unborn child subsequently born alive) suffered great bodily harm as a result of the collision. "Great bodily harm" means bodily harm that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss of impairment of the function of any part of the body or other serious bodily

harm. An unborn child means the unborn offspring of a human being conceived, but not yet born.

[B] Sixth, \_\_\_\_\_ (the victim) suffered substantial bodily harm as a result of the collision. "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.

[C] Sixth, \_\_\_\_\_ (the victim) suffered bodily harm as a result of the collision. "Bodily harm" means physical pain or injury, illness or any impairment of physical condition.

Seventh, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

The definition of "motor vehicle" is found in M.S.A. § 169.011, subd. 42. Attached trailers are included under M.S.A. 169.011, subd. 86.

The "mens rea" requirement for this offense, that defendant knew the accident was of a type involving injury to a person or damage to another vehicle (See M.S.A. 169.09), was set out by the Supreme Court in *State v. Al-Naseer*, 634 N.W.2d 679 (Minn. 2007).



**CRIMJIG 11.77****CRIMINAL VEHICULAR OPERATION—LEAVING  
THE SCENE—SUBSTANTIAL BODILY HARM—  
DEFINED**

Under Minnesota law, the driver of a motor vehicle who causes a collision resulting in the substantial bodily harm to any person, and who does not (stop and remain at the scene of the collision stop and remain at the scene of the accident or as close to the collision as possible and investigate what was struck) (identify (himself) (herself) at the scene of the collision) (quickly notify the authorities of the collision), is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2113, subd. 2(7).

*See* M.S.A. § 169.09, subd. 1 and 6 for the crime of leaving the scene of an accident.

**CRIMJIG 11.78****CRIMINAL VEHICULAR OPERATION—LEAVING  
THE SCENE—SUBSTANTIAL BODILY HARM—  
ELEMENTS**

The elements of criminal vehicular operation are:

First, \_\_\_\_\_ sustained substantial bodily harm as a result of a collision in which the defendant was involved as the driver of a motor vehicle. "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.

[1] Second, the defendant failed to stop the vehicle at the scene of the accident or as close as possible to the scene and reasonably investigate what was struck.

[2] Second, the defendant failed to give or show identification at the scene of the collision.

[3] Second, the defendant failed to give notice of the collision by the quickest means of communication to law enforcement authorities.

Third, the defendant's driving caused the collision (either directly or immediately or through a series of happenings that followed one after another).

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 11.79****LEAVING THE SCENE—DEATH—DEFENDANT NOT  
THE CAUSE OF THE COLLISION—DEFINED**

Under Minnesota law, the driver of a motor vehicle involved in a collision, resulting in the death of any person, but who did not cause the collision, and who does not (stop and remain at the scene of the accident or as close to the collision as possible and investigate what was struck) (identify (himself) (herself) at the scene of the collision) (quickly notify the authorities of the collision), is guilty of a crime.

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**COMMENT**

M.S.A. § 169.09, subds. 1, 6, and 14(a). Although the statute is clear that it applies only when the defendant did not cause the accident, the Committee believes that it is not the State's burden to prove that the driver did not cause the collision and therefore it is not included as an element of the offense.



**CRIMJIG 11.80**

**LEAVING THE SCENE—DEATH—DEFENDANT NOT  
THE CAUSE OF THE COLLISION—ELEMENTS**

The elements of leaving the scene of an accident are:

First, the death of \_\_\_\_\_ occurred as the result of a collision in which defendant was involved as the driver of a motor vehicle.

[1] Second, the defendant failed to stop the motor vehicle at the scene of the accident or as close as possible to the scene and reasonably investigate what was struck.

[2] Second, the defendant failed to give or show identification at the scene of the collision.

[3] Second, the defendant failed to give notice of the collision by the quickest means of communication to law enforcement authorities.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 11.81****LEAVING THE SCENE—BODILY INJURY—  
DEFENDANT NOT THE CAUSE OF THE  
COLLISION—DEFINED**

Under Minnesota law, the driver of a vehicle who is involved in a collision resulting in immediately demonstrable bodily injury to any person, but who did not cause the collision, and who does not (stop and remain at the scene of the accident or as close to the collision as possible and investigate what was struck) (identify (himself) (herself) at the scene of the collision) is guilty of a crime.

M.S.A. 169.09, subds. 1, 6, and 14(a).

**CRIMJIG 11.82**

**LEAVING THE SCENE—BODILY INJURY—  
DEFENDANT NOT THE CAUSE OF THE  
COLLISION—ELEMENTS**

The elements of leaving the scene of a collision are:

First, \_\_\_\_\_ sustained immediately demonstrable bodily injury as the result of a collision in which the defendant was involved as the driver of a vehicle.

[1] Second, the defendant failed to stop the vehicle at the scene of the collision or as close as possible to the scene and reasonably investigate what was struck.

[2] Second, the defendant failed to give or show identification at the scene of the collision.

[1] Third, \_\_\_\_\_ sustained great bodily harm. "Great bodily harm" means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

[2] Third \_\_\_\_\_ sustained substantial bodily harm? "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.

[3] Third, \_\_\_\_\_ sustained less than substantial bodily harm. "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven be-



yond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 169.09, subds. 1, 6, and 14(a).

**CRIMJIG 11.83**

**LEAVING THE SCENE—BODILY INJURY—FAILURE  
TO NOTIFY—DEFENDANT NOT THE CAUSE OF  
THE COLLISION—DEFINED**

Under Minnesota law, the driver of a vehicle who is involved in a collision resulting in demonstrable bodily injury to any person, but who did not cause the collision, and who does not quickly notify the authorities of the accident is guilty of a crime.

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**COMMENT**

M.S.A. § 169.09, subd. 1, 6, and 14(a).

**CRIMJIG 11.84****LEAVING THE SCENE—BODILY INJURY—FAILURE  
TO NOTIFY—DEFENDANT NOT THE CAUSE OF  
THE COLLISION—ELEMENTS**

The elements of leaving the scene of an accident are:

First, \_\_\_\_\_ sustained demonstrable bodily injury as the result of a collision in which the defendant was involved as the driver of a motor vehicle.

Second, the defendant failed to give notice of the collision by the quickest means of communication to law enforcement authorities.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 169.09, subds. 1, 6, and 14(a).

In *State v. Backus*, 358 N.W.2d 93 (Minn. App. 1984), the Court of Appeals noted the Committee's comment that the term "demonstrable" was a word of common usage, but it was not error for the trial court to define it by use of a dictionary definition of the word "demonstrable."



**CRIMJIG 11.85****DEFENSE TO LEAVING THE SCENE**

The defendant asserts a defense to leaving the scene.

It is a defense to the charge of leaving the scene of a collision that the defendant left the scene of the collision to take any person suffering immediately demonstrable bodily injury in the accident to receive emergency medical care. If the defendant so acted, the defendant must also have given notice to a law enforcement agency of the collision as soon as reasonably feasible after the emergency medical care has been undertaken for this defense to exist.

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**COMMENT**

M.S.A. § 169.09, subd. 15. While this defense applies to M.S.A. § 169.09, subds. 1 and 6, it is clear that it is only available when an immediately demonstrable bodily injury has occurred.

**CRIMJIG 11.86****CRIMINAL VEHICULAR HOMICIDE—FAILURE TO  
MAINTAIN—DEATH—DEFINED**

Under Minnesota law, whoever operates a motor vehicle having actual knowledge that a peace officer has previously issued a citation or warning that the motor vehicle was defectively maintained, and having actual knowledge that no remedial action has been taken, and the driver had reason to know the defect created a present danger to others, and the death of (any person) (an unborn child) is caused by the defective maintenance is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2112, subd. 1(8); M.S.A. § 609.2114, subd. 1(8) (formerly M.S.A. § 609.21, subd. 1(8) and subd 1a(a)).

**CRIMJIG 11.87****CRIMINAL VEHICULAR HOMICIDE—FAILURE TO  
MAINTAIN—DEATH—ELEMENTS**

The elements of criminal vehicular homicide are:

First, the defendant operated a motor vehicle. A “motor vehicle” is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on lands, rails, water, or in the air. The term “motor vehicle” also includes attached trailers.

Second, the defendant had actual knowledge that a peace officer has previously issued a citation or warning that the motor vehicle was defectively maintained.

Third, the defendant had actual knowledge that no remedial action has been taken.

Fourth, the driver had reason to know the defect created a present danger to others.

Fifth, the death of \_\_\_\_\_(any person) (an unborn child) was caused by the defective maintenance.

Sixth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



**CRIMJIG 11.88****CRIMINAL VEHICULAR HOMICIDE—FAILURE TO  
MAINTAIN—BODILY HARM—DEFINED**

Under Minnesota law, whoever operates a motor vehicle having actual knowledge that a peace officer has previously issued a citation or warning that the motor vehicle was defectively maintained and having actual knowledge that no remedial action has been taken, and the driver has reason to know the defect creates a present danger to others, and the bodily harm of (any person) (an unborn child) is caused by the defective maintenance is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2113, subd. 1(8); subd. 2(8); and subd.3; M.S.A. § 609.2114, subd. 2(8).

**CRIMJIG 11.89****CRIMINAL VEHICULAR HOMICIDE—FAILURE TO  
MAINTAIN—BODILY HARM—ELEMENTS**

The elements of criminal vehicular operation are:

First, the defendant operated a motor vehicle. A "motor vehicle" is a self-propelled device for moving persons or property or pulling implements from one place to another, whether the device is operated on lands, rails, water, or in the air. The term "motor vehicle" also includes attached trailers.

Second, the defendant had actual knowledge that a peace officer has previously issued a citation or warning that the motor vehicle was defectively maintained.

Third, the defendant had actual knowledge that no remedial action has been taken.

Fourth, the driver had reason to know the defect created a present danger to others.

[Fifth, great bodily harm to \_\_\_\_ (the victim) (an unborn child subsequently born alive) was caused by the defective maintenance. "Great bodily harm" means bodily harm that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss of impairment of the function of any part of the body or other serious bodily harm. An unborn child means the unborn offspring of a human being conceived, but not yet born.]

[Fifth, substantial bodily harm to \_\_\_\_ (the victim) was caused by the defective maintenance. "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.]

[Fifth, bodily harm to \_\_\_\_ (the victim) was caused by the defective maintenance. "Bodily harm" means physical pain or injury, illness or any impairment of physical condition.]

Sixth, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

The definition of "motor vehicle" is found in M.S.A. § 169.011, subd. 42. Attached trailers are included under M.S.A. 169.011, subd. 86.



## CHAPTER 12

# SEX CRIMES AND FAMILY CRIMES

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**CRIMJIG 12.01****“FORCE” AND “COERCION” DEFINED FOR  
CRIMINAL SEXUAL CONDUCT**

[The term “force” means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably

believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

[The term "coercion" means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

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#### COMMENT

M.S.A. § 609.341, subds. 3, 14. See M.S.A. § 609.02, subd. 7, for the definition of "bodily harm."

**CRIMJIG 12.02****CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE—FEAR OF GREAT BODILY HARM, FORCE, ETC.—DEFINED**

Under Minnesota law, whoever engages in sexual penetration with another person and

[1] the circumstances existing at the time of the act caused the other person to have a reasonable fear of imminent great bodily harm to (himself) (herself) or another

[2] was armed with a dangerous weapon (or any article used or fashioned in a manner to lead the other person to reasonably believe it to be a dangerous weapon) and used or threatened to use the weapon (or article) to cause the other person to submit

[3] caused personal injury to the other person, and used force or coercion to accomplish sexual penetration

[4] caused personal injury to the other person, and knew or had reason to know that the other person was (mentally impaired) (mentally incapacitated) (physically helpless)

[5] who was aided or abetted by one or more accomplices, and

[a] an accomplice used force or coercion to cause the other person to submit

[b] an accomplice was armed with a dangerous weapon (or any article used or fashioned in a manner to lead the other person to reasonably believe it to be a dangerous weapon) and used or threatened to use the weapon (or article) to cause the other person to submit

is guilty of a crime.



**COMMENT**

M.S.A. § 609.342(c), (d), (e), (f); M.S.A. § 609.341, subd. 12.

**CRIMJIG 12.03****CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE—FEAR OF GREAT BODILY HARM, FORCE, ETC.—ELEMENTS**

The elements of criminal sexual conduct in the first degree are:

First, the defendant intentionally sexually penetrated

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[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue, or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object used by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

[1] Second, the sexual penetration occurred without the consent of \_\_\_\_\_. "Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the (defendant) (accomplice) (actor). Consent does not mean the existence of a prior or cur-

rent social relationship between the defendant and \_\_\_\_\_, or that \_\_\_\_\_ failed to resist a particular sexual act.

Third, at the time of the defendant's act, \_\_\_\_\_ had a reasonable fear of imminent great bodily harm to (himself) (herself) or \_\_\_\_\_. "Great bodily harm" means bodily harm that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm. "To fear imminent great bodily harm" means that the person must fear that such harm will occur immediately.

Fourth, the defendant accomplished the act because \_\_\_\_\_ had such a fear of imminent great bodily harm.

[2] Second, the sexual penetration occurred without the consent of \_\_\_\_\_. "Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the (defendant) (accomplice) (actor). Consent does not mean the existence of a prior or current social relationship between the defendant and \_\_\_\_\_, or that \_\_\_\_\_ failed to resist a particular sexual act.

Third, the defendant was armed with (\_\_\_\_\_) (a dangerous weapon) (an article used or fashioned in a manner to lead \_\_\_\_\_ to reasonably believe it was a dangerous weapon) and used or threatened to use it with the intention of causing \_\_\_\_\_ to submit. (A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.) (A "dangerous weapon" is anything designed as a weapon and capable of producing death or great bodily harm; or any combustible or flammable liquid<sup>1</sup> or anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm; or any fire that is used to produce death or great bodily harm.)

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12.03

<sup>1</sup>A flammable liquid is defined by statute to be a Class I flammable liquid as defined in section 9.108 of the

Uniform Fire Code, but does not include intoxicating liquor as defined in M.S.A. § 340.07. M.S.A. § 609.01, subd. 6.



Fourth, \_\_\_\_\_ submitted because of defendant's use or threatened use of the (dangerous weapon) (article).

[3] Second, the sexual penetration occurred without the consent of \_\_\_\_\_. "Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the defendant. Consent does not mean the existence of a prior or current social relationship between the defendant and \_\_\_\_\_, or that \_\_\_\_\_ failed to resist a particular sexual act.

Third, the defendant caused personal injury to \_\_\_\_\_. "Personal injury" means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.

Fourth, the defendant used force or coercion to accomplish the act.<sup>2</sup>

[4] Second, the defendant caused personal injury to \_\_\_\_\_. "Personal injury" means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.

Third, defendant knew or had reason to know that \_\_\_\_\_ was (mentally impaired) (mentally incapacitated) (physically helpless).

[A] A person is mentally impaired if (he) (she), as the result of inadequately developed or impaired intelligence or as the result of a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual penetration.

[B] A person is mentally incapacitated if, due to the influence of (alcohol) (a narcotic) (anesthetic) (any other substance) administered without (his) (her) agreement, (he) (she) lacks the judgment to give reasoned consent to sexual penetration.

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<sup>2</sup>For definitions of "force" and "coercion," see CRIMJIG 12.01.

[C] A person is physically helpless if [he] [she] is:

[1] asleep or not conscious;

[2] is unable to withhold consent;

[3] is unable to communicate non-consent.

[5] Second, the sexual penetration occurred without the consent of \_\_\_\_\_. "Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the (defendant) (accomplice) (actor). Consent does not mean the existence of a prior or current social relationship between the defendant and \_\_\_\_\_, or that \_\_\_\_\_ failed to resist a particular sexual act.

Third, the defendant was aided by (\_\_\_\_\_) (an accomplice) (one or more accomplices) in committing the act.

Fourth,

[A] \_\_\_\_\_ (an accomplice of the defendant) used force or coercion to cause \_\_\_\_\_ to submit. [An "accomplice" is a person who aids another in the commission of a crime if (he) (she) intentionally aids the other person, or intentionally advises, hires, or requests the other person to commit it.]

[The term "force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

[The term "coercion" means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant



of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.))

[B] \_\_\_\_\_ (an accomplice of the defendant) was armed with a (\_\_\_\_\_) (dangerous weapon) (or any article used or fashioned in a manner to lead \_\_\_\_\_ to reasonably believe it to be a dangerous weapon), and used or threatened to use the weapon (or article) to cause \_\_\_\_\_ to submit, and \_\_\_\_\_ did submit because of the use or threatened use of the weapon (or article). [An “accomplice” is a person who aids another in the commission of a crime if (he) (she) intentionally aids the other person, or intentionally advises, hires, or requests the other person to commit it.] [A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.] [A “dangerous weapon” is anything designed as a weapon and capable of producing death or great bodily harm; or any combustible or flammable liquid or anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm;<sup>3</sup> or any fire that is used to produce death or great bodily harm.]

(Fourth) (Fifth), the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the \_\_\_\_\_

<sup>3</sup>A flammable liquid is defined by statute to be a Class I flammable liquid as defined in section 9.108 of the Uniform Fire Code, but does not in-

clude intoxicating liquor as defined in M.S.A. § 340.07. M.S.A. § 609.01, subd. 6.



defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense? See CRIMJIG 12.01 for special verdict form.

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COMMENT

See M.S.A. § 609.02, subd. 8, for a definition of “great bodily harm.”

See M.S.A. § 609.02, subd. 6, and the Comment to CRIMJIG 13.10 for the definition of “dangerous weapon.”

Where no issue was raised concerning the precise character of the actual or threatened injury, in a prosecution for criminal sexual assault in the first degree, the failure to define “great bodily harm” in the trial court’s jury instructions was not error. *Peterson v. State*, 282 N.W.2d 878 (Minn. 1979).

In *State v. Blom*, 358 N.W.2d 63 (Minn. 1984), the Supreme Court expressed approval of this instruction on the definition of cunnilingus as sexual penetration.

In *State v. O’Brien*, 364 N.W.2d 901 (Minn. App. 1985), decision affirmed as modified, 369 N.W.2d 525 (Minn. 1985), the Court of Appeals held that the substantive essential elements of criminal sexual conduct in the first degree under M.S.A. § 609.342, subd. 1(e)(i) are: (1) penetration, (2) personal injury to the victim, and (3) penetration accomplished through force or coercion.

In *State v. Sollman*, 402 N.W.2d 634 (Minn. App. 1987), the Court of Appeals held that “the injuries need not necessarily be coincidental with actual sexual penetration, they need only be sufficiently related to the act to constitute ‘personal injury’ within the meaning of M.S.A. § 609.341.”

The Court of Appeals held in *State v. Jarvis*, 649 N.W.2d 186 (Minn. App. 2002) that the act of drugging the victim could establish two separate elements of first-degree sexual conduct, namely the elements of mental impairment or physical helplessness and personal injury. The Supreme Court, affirming *Jarvis*, 665 N.W.2d 518 (Minn. 2003), held that causing a victim to involuntarily ingest a toxic amount of barbiturates, which causes unconsciousness and weakens or damages the victim’s ability to move, remember, speak, drive and generally function in a normal way, is a sufficient impairment of physical condition to constitute “bodily harm” under M.S.A. § 609.02, subd. 7.

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A)

require a finding that a prior conviction be committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted to the jury

**CRIMJIG 12.04****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—SEXUAL PENETRATION COMPLAINANT  
UNDERAGE—DEFINED**

Under Minnesota law, whoever engages in sexual penetration with another person

[1] who is under the age of 13, when the actor is more than 36 months older than the other person,

[2] under the age of 16, when the actor is more than 48 months older than the other person and is in a position of authority over that person,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.342, subd. 1(a) and (b).



**CRIMJIG 12.05****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—SEXUAL PENETRATION—  
COMPLAINANT UNDERAGE—ELEMENTS**

The elements of criminal sexual conduct in the first degree are:

First, the defendant intentionally sexually penetrated  
\_\_\_\_\_.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

[1] Second, at the time of the defendant's act, \_\_\_\_\_ was under thirteen years of age.

Third, the defendant was more than 36 months older than  
\_\_\_\_\_.

[2] Second, at the time of the defendant's act, \_\_\_\_\_ was at least thirteen but less than 16 years of age.

Third, the defendant was more than 48 months older than \_\_\_\_\_.

Fourth, the defendant was in a position of authority over \_\_\_\_\_. A "position of authority" includes, but is not limited to, any person who is (a parent) (or) (is acting in the place of a parent and is charged with any rights, duties, or responsibilities of a parent) (or) (a person who is charged with any duty or responsibility for the health, welfare or supervision of a child, either independently or through another, no matter how briefly), at the time of the act.

(Fourth) (Fifth), the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

Consent is not a defense to this charge.

It is immaterial whether or not the sexual penetration was coerced.

Mistake as \_\_\_\_\_'s age is not a defense to this charge.

If you find that each of these elements has been proven beyond a reasonable doubt, defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

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#### COMMENT

See Comment to CRIMJIG 12.03.

The Committee notes that evidence as to appearance, manner, or experience is immaterial, as neither consent nor mistake as to age is a defense to this crime.

The statutory definition of "position of authority" does not contain an exclusive list of persons in a position of authority. *State v. Larson*, 520 N.W.2d 456 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994).

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of

Appeals was asked to resolve a question on the meaning of “position of authority.” In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a “position of authority.” The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the “position of authority” language of the statute is “broadly defined.”

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn. App. 2006), held, against a vagueness challenge, that the statutory definition of “position of authority” included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work premises.



**CRIMJIG 12.06****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—SEXUAL CONTACT COMPLAINANT  
UNDER 13—DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person who is under the age of 13, and the actor is more than 36 months older than the other person, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.342, subd. 1(a).

**CRIMJIG 12.07****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—SEXUAL CONTACT COMPLAINANT  
UNDER 13—ELEMENTS**

The elements of criminal sexual conduct in the first degree are:

First, the defendant intentionally touched \_\_\_\_\_'s bare genitals or anal opening with (his) (her) (the defendant's) bare genitals or anal opening, or \_\_\_\_\_'s bare genitals or anal opening touched the bare genitals or anal opening of the defendant [or another].

Second, the defendant's act was committed with sexual or aggressive intent.

Third, at the time of the defendant's act, \_\_\_\_\_ had not reached (his) (her) thirteenth birthday.

Fourth, the defendant was more than 36 months older than \_\_\_\_\_.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

Mistake as to (\_\_\_\_\_) 's (the victim's) age is not a defense.

Consent is not a defense to this charge.

It is immaterial whether or not the sexual contact was coerced.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**COMMENT**

M.S.A. § 609.342, subd. 1(a).

The Committee notes that evidence as to appearance, manner, or experience is immaterial, as neither consent nor mistake as to age is a defense to this crime.



**CRIMJIG 12.08****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT UNDER 16—USE OF FORCE—  
DEFINED**

Under Minnesota law, whoever engages in sexual penetration with another person, when the actor had a significant relationship with the other person, the other person was under 16 years of age, and

- [1] the actor or an accomplice used force or coercion to accomplish the penetration,
- [2] the other person suffered personal injury,
- [3] the sexual abuse involved multiple acts committed over an extended period of time,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.342, subd. 1(h).

**CRIMJIG 12.09****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT UNDER 16—USE OF FORCE—  
ELEMENTS**

The elements of criminal sexual conduct in the first degree are:

First, the defendant intentionally sexually penetrated \_\_\_\_\_.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, the defendant had a significant relationship with \_\_\_\_\_. A "significant relationship" means a situation in which the defendant is \_\_\_\_\_'s parent, stepparent, or guardian, or is any of the following persons related to \_\_\_\_\_ by blood, marriage, or adoption: brother, sister, stepbrother, stepsister,

first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or is an adult who jointly resides intermittently or regularly in the same dwelling as \_\_\_\_\_ and is not \_\_\_\_\_'s spouse.

Third, \_\_\_\_\_ was under 16 years of age at the time of the sexual penetration.

Consent is not a defense to this charge.

Mistake as to (\_\_\_\_\_)’s (victim’s) age is not a defense to this charge.

[1] Fourth, the defendant or an accomplice used force or coercion to accomplish the penetration. [Give CRIMJIG 4.01 on accomplice liability if necessary.]

[The term “force” means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.))]

[The term “coercion” means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.))]

[2] Fourth, the defendant caused personal injury to \_\_\_\_\_. “Personal injury” means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.



[3] Fourth, the sexual abuse involved multiple acts committed over an extended period of time.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

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#### COMMENT

See M.S.A. § 609.341, subd. 15 for definition of "significant relationship."

In *State v. Shamp*, 422 N.W.2d 520 (Minn. App. 1988), the Court of Appeals held that in a prosecution for criminal sexual conduct in the first degree involving conduct with a person of a significant relationship and involving allegations of multiple acts of sexual abuse over a period of time, a conviction would be sustained if the prosecution proved at least one act of sexual penetration and multiple acts of sexual abuse, rather than proof of multiple acts of sexual penetration.

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A) require a finding that a prior conviction was committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted to the jury

**CRIMJIG 12.10****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—COMPLAINANT UNDER 16—  
SIGNIFICANT RELATIONSHIP—DEFINED**

Under Minnesota law, whoever engages in sexual penetration with another person who is under 16, when the actor had a significant relationship with the other person, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.342, subd. 1(g).

**CRIMJIG 12.11****CRIMINAL SEXUAL CONDUCT IN THE FIRST  
DEGREE—COMPLAINANT UNDER 16—  
SIGNIFICANT RELATIONSHIP—ELEMENTS**

The elements of criminal sexual conduct in the first degree are:

First, the defendant intentionally sexually penetrated \_\_\_\_\_.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, at the time of the defendant's act, \_\_\_\_\_ was under sixteen years of age.



Third, the defendant had a significant relationship with \_\_\_\_\_. "Significant relationship" means \_\_\_\_\_.<sup>1</sup>

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

Consent is not a defense to this charge.

Mistake as to (\_\_\_\_\_')s) (the victim's) age is not a defense.

It is immaterial whether or not the sexual penetration was coerced.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

See M.S.A. § 609.341, subd. 15, for definition of "significant relationship."

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#### 12.11

<sup>1</sup>See M.S.A. § 609.341, subd. 15, for definition of "significant relationship."

**CRIMJIG 12.12****CRIMINAL SEXUAL CONDUCT IN THE SECOND  
DEGREE—FEAR OF GREAT BODILY HARM,  
FORCE, ETC.—DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person and

[1] the circumstances existing at the time of the act cause the other person to have a reasonable fear of imminent great bodily harm to (himself) (herself) or another,

[2] the defendant is armed with a dangerous weapon (or any article used or fashioned in a manner to lead the other person to reasonably believe it to be a dangerous weapon), and uses or threatens to use the weapon (or article) to cause the other person to submit,

[3] the defendant causes personal injury to the other person, and uses force or coercion to accomplish sexual contact,

[4] the defendant causes personal injury to the other person, and knows or has reason to know that the other person is (mentally impaired) (mentally incapacitated) (physically helpless),

[5] the defendant is aided or abetted by one or more accomplices, and

[A] an accomplice uses force or coercion to cause the other person to submit,

[B] an accomplice is armed with a dangerous weapon (or any article used or fashioned in a manner to lead the other person to reasonably believe it to be a dangerous weapon), and uses or threatens to use the weapon (or article) to cause the other person to submit,

is guilty of a crime.

**COMMENT**

M.S.A. § 609.343, subd. 1(c) to (f).



**CRIMJIG 12.13****CRIMINAL SEXUAL CONDUCT IN THE SECOND  
DEGREE—FEAR OF GREAT BODILY HARM,  
FORCE, ETC.—ELEMENTS**

The elements of criminal sexual conduct in the second degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the sexual contact occurred without the consent of \_\_\_\_\_. ["Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the (defendant) (accomplice) (actor). Consent does not mean the existence of a prior or current social relationship between the defendant and \_\_\_\_\_ or that \_\_\_\_\_ failed to resist a particular sexual act.]

Third, the defendant's act was committed with sexual or aggressive intent.

[1] Fourth, at the time of the defendant's act, \_\_\_\_\_ had a reasonable fear of imminent great bodily harm to (himself) (herself) or \_\_\_\_\_. "Great bodily harm" means bodily harm that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm. "To fear imminent great bodily harm" means that the person must fear that such harm will occur immediately.

Fifth, the defendant accomplished the act because \_\_\_\_\_ had such a fear of imminent great bodily harm.

[2] Fourth, the defendant was armed with (\_\_\_\_\_) (a dangerous weapon) (an article used or fashioned in a manner to lead \_\_\_\_\_ to reasonably believe it was a dangerous weapon), and used or threatened to use it with the intention of causing \_\_\_\_\_ to submit. (A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.) (A "dangerous weapon" is anything designed as a weapon and capable of producing death or great bodily harm; or any combustible or flammable liquid or anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm; or any fire that is used to produce death or great bodily harm.)

Fifth, the defendant caused \_\_\_\_\_ to submit by the use or threatened use of the dangerous weapon (or article).

[3] Fourth, the defendant caused personal injury to \_\_\_\_\_. "Personal injury" means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.

Fifth, the defendant used force or coercion to accomplish the act.

[The term "force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

[The term "coercion" means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_)]



(the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.))

[4] Fourth, the defendant caused personal injury to \_\_\_\_\_. “Personal injury” means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.

Fifth, the defendant knew or had reason to know that was (mentally impaired) (mentally incapacitated) (physically helpless).

[A] A person is mentally impaired if, as the result of inadequately developed or impaired intelligence, or as the result of a substantial psychiatric disorder of thought or mood, (he) (she) lacks the judgment to give a reasoned consent to sexual contact.

[B] A person is mentally incapacitated if, due to the influence of (alcohol) (a narcotic) (anesthetic) (any other substance) administered without (his) (her) agreement, (he) (she) lacks the judgment to give reasoned consent to sexual contact.

[C] A person is physically helpless if [he] [she] is:

[1] asleep or not conscious;

[2] unable to withhold consent or to withdraw consent because of a physical condition;

[3] unable to communicate non-consent.

[5] Fourth, the defendant was aided by (\_\_\_\_\_) (an accomplice) (one or more accomplices) in committing the act.

Fifth,

[A] \_\_\_\_\_ (an accomplice of the defendant) used



force or coercion to cause to submit. [An “accomplice” is a person who aids another in the commission of a crime if (he) (she) intentionally aids the other person, or intentionally advises, hires, or requests the other person to commit it. [Give CRIMJIG 4.01 if necessary.]]

[The term “force” means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.))]

[The term “coercion” means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.))]

[B] \_\_\_\_\_ (an accomplice of the defendant) was armed with a (\_\_\_\_\_) (dangerous weapon) (or any article used or fashioned in a manner to lead \_\_\_\_\_ to reasonably believe it was a dangerous weapon), and used or threatened to use the weapon (or article) to cause \_\_\_\_\_ to submit, and \_\_\_\_\_ did submit because of the use or threatened use of the weapon (or article). [An “accomplice” is a person who aids another in the commission of a crime if (he) (she) intentionally aids the other person, or intentionally advises, hires, or requests the other person to commit it. [Give CRIMJIG 4.01 if necessary.]] [A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.] [A “dangerous weapon” is anything designed as a weapon and capable of producing death or

great bodily harm; or any combustible or flammable liquid or anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm; or any fire that is used to produce death or great bodily harm.]

Sixth, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

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#### COMMENT

The Court of Appeals held, in *State v. Jarvis*, 649 N.W.2d 186 (Minn. App. 2002) that the act of drugging the victim could establish two separate elements of first-degree criminal sexual conduct, namely the elements of mental impairment or physical helplessness and personal injury. The Supreme Court, affirming *Jarvis*, 665 N.W.2d 518 (Minn. 2003), held that causing a victim to involuntarily ingest a toxic amount of barbiturates, which causes unconsciousness and weakens or damages the victim's ability to move, remember, speak, drive and generally function in a normal way, is a sufficient impairment of physical condition to constitute "bodily harm" under M.S.A. § 609.02, subd. 7.

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A) require a finding that a prior conviction was committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted to the jury



**CRIMJIG 12.14****CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE—COMPLAINANT UNDERAGE—DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person

[1] under the age of 13, and the actor is more than 36 months older than that person,

[2] under the age of 16, and the actor is more than 48 months older than that person and is in a position of authority over that person,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.343, subd. 1(a) and (b).



**CRIMJIG 12.15****CRIMINAL SEXUAL CONDUCT IN THE SECOND  
DEGREE—COMPLAINANT UNDERAGE—  
ELEMENTS**

The elements of criminal sexual conduct in the second degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Consent is not a defense to this charge.

Second, the defendant's act was committed with sexual or aggressive intent.

[1] Third, at the time of the defendant's act, \_\_\_\_\_ was under thirteen years of age. Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

It is immaterial whether or not the sexual contact was coerced.

Fourth, the defendant was more than 36 months older than \_\_\_\_\_.

[2] Third, at the time of the defendant's act, \_\_\_\_\_ was at least thirteen and under sixteen years of age. Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

Fourth, the defendant was more than 48 months older than \_\_\_\_\_.

Fifth, the defendant was in a position of authority over \_\_\_\_\_. A "position of authority" includes, but is not limited to, any person who is (a parent) (or) (is acting in the place of a parent and is charged with any rights, duties, or responsibilities of a parent) (or) (a person who is charged with any duty or responsibility for the health, welfare or supervision of a child, either independently or through another, no matter how briefly), at the time of the act.

(Fifth) (Sixth), the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

The statutory definition of "position of authority" does not contain an exclusive list of persons in a position of authority. *State v. Larson*, 520 N.W.2d 456 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994).

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of Appeals was asked to resolve a question on the meaning of "position of authority." In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a "position of authority." The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the "position of authority" language of the statute is "broadly defined."

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn. App. 2006), held, against a vagueness challenge, that the statutory definition of "position of authority" included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work

premises.



**CRIMJIG 12.16****CRIMINAL SEXUAL CONDUCT IN THE SECOND  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT UNDER 16—USE OF FORCE—  
DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person and had a significant relationship with the other person, is guilty of a crime if the other person was under 16 years of age, and

- [1] the actor or an accomplice used force or coercion to accomplish the contact
- [2] the other person suffered personal injury.
- [3] the sexual abuse involved multiple acts committed over an extended period of time.

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**COMMENT**

M.S.A. § 609.343, subd. 1(h).

**CRIMJIG 12.17****CRIMINAL SEXUAL CONDUCT IN THE SECOND  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT UNDER 16—USE OF FORCE—  
ELEMENTS**

The elements of criminal sexual conduct in the second degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

Third, the defendant had a significant relationship with \_\_\_\_\_. A "significant relationship" means a situation in which the defendant is \_\_\_\_\_'s parent, stepparent, or guardian, or is any of the following persons related to \_\_\_\_\_ by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or is an adult who jointly resides intermittently or regularly in the same dwelling as \_\_\_\_\_ and is not \_\_\_\_\_'s spouse.

Fourth, \_\_\_\_\_ was under 16 years of age at the time of the act.

Mistake as to (\_\_\_\_\_) 's (the complainant's) age is not a defense to this charge.

Consent is not a defense to this charge.

[1] Fifth, the defendant or an accomplice used force or coercion to accomplish the contact. An "accomplice" is a person who aids another in the commission of a crime if (he) (she) intentionally aids the other person, or intentionally advises, hires, or requests the other person to commit it. [Give CRIMJIG 4.01 if necessary.]

[The term "force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.))]

[The term "coercion" means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.))]

Sixth, the defendant accomplished the act because \_\_\_\_\_ had such a fear of imminent great bodily harm.

[2] Fifth, the defendant caused personal injury to \_\_\_\_\_. "Personal injury" means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.

[3] Fifth, the sexual abuse involved multiple acts committed over an extended period of time.

(Sixth) (Seventh), the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.



If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

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#### COMMENT

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A) require a finding that a prior conviction was committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted to the jury

**CRIMJIG 12.18**

**CRIMINAL SEXUAL CONDUCT IN THE SECOND  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT UNDER 16—DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person under the age of 16 and has a significant relationship with the other person is guilty of a crime.

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COMMENT

M.S.A. § 609.343, subd. 1(g).

**CRIMJIG 12.19****CRIMINAL SEXUAL CONDUCT IN THE SECOND  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT UNDER 16—ELEMENTS**

The elements of criminal sexual conduct in the second degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

Second, the defendant's act was committed with sexual or aggressive intent.

Third, at the time of the defendant's act, \_\_\_\_\_ was under sixteen years of age.

Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense to this charge.

Consent is not a defense to this charge.

It is immaterial whether or not the sexual contact was coerced.

Fourth, the defendant had a significant relationship with \_\_\_\_\_. A "significant relationship" means a situation in which the defendant is \_\_\_\_\_'s parent, stepparent, or guardian, or any of the following persons related to \_\_\_\_\_ by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or an adult who jointly resides intermittently or regularly in the same dwelling as \_\_\_\_\_ and is not \_\_\_\_\_'s spouse.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.



If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

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COMMENT

See M.S.A. § 609.341, subd. 15, for definition of significant relationship.

**CRIMJIG 12.20**

**CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—FORCE—DEFINED**

Under Minnesota law, whoever engages in sexual penetration with another person and uses force or coercion to accomplish the penetration is guilty of a crime.

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**COMMENT**

M.S.A. § 609.344, subd. 1(c).

**CRIMJIG 12.21****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—FORCE—ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated \_\_\_\_\_.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, the sexual penetration occurred without the consent of \_\_\_\_\_. "Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the (defendant) (accomplice) (actor). Consent does not mean the existence of a prior or current social relationship between the defendant and \_\_\_\_\_, or that \_\_\_\_\_ failed to resist a particular sexual act.



Third, the defendant used force or coercion to accomplish the penetration.

[The term “force” means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.)]

[The term “coercion” means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.)]

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

## COMMENT

See Comment to CRIMJIG 12.03.

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A) require a finding that a prior conviction was committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted to the jury

**CRIMJIG 12.22****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—MENTAL IMPAIRMENT, PHYSICALLY  
HELPLESS—DEFINED**

Under Minnesota law, whoever engages in sexual penetration with another person and knows or has reason to know that the other person is (mentally impaired) (mentally incapacitated) (physically helpless) is guilty of a crime.

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**COMMENT**

M.S.A. § 609.344, subd. 1(d).

In *State v. Willenbring*, 454 N.W.2d 268 (Minn. App. 1990), the Court of Appeals held that, although the statute was phrased in somewhat general language, it was not unconstitutionally vague, and the requirement posed by the statute that the defendant knew or had reason to know of the mental impairment of the victim served to mitigate whatever vagueness issue might otherwise exist.



**CRIMJIG 12.23****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—MENTAL IMPAIRMENT, MENTAL  
INCAPACITY, PHYSICALLY HELPLESS—  
ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated

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[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, the defendant knew or had reason to know that \_\_\_\_\_ was (mentally impaired) (mentally incapacitated) (physically helpless).

[A] "Mentally impaired" means that a person as the

result of inadequately developed or impaired intelligence, or as the result of a substantial psychiatric disorder of thought or mood, lacks the judgment to give reasoned consent to sexual penetration.

[B] A person is mentally incapacitated if (he) (she) lacks the judgment to give reasoned consent to sexual penetration due to the influence of (alcohol) (a narcotic) (anesthetic) (any other substance) administered without (his) (her) agreement.

[C] A person is physically helpless if (he) (she) is:

- (1) asleep or not conscious;
- (2) unable to withhold consent or to withdraw consent because of a physical condition; or
- (3) unable to communicate non-consent.

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

## CRIMJIG 12.24

### CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE—COMPLAINANT UNDERAGE—DEFINED

Under Minnesota law, whoever engages in sexual penetration with another person

[1] under the age of 13, and who is no more than 36 months older than that person,

[2] under the age of 16, and who is more than 24 months older than that person,

[3] who is at least 16 years of age but less than 18 years of age, and who is more than 48 months older than that person and is in a position of authority over the other person,

is guilty of a crime.

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#### COMMENT

M.S.A. § 609.344, subd. 1(a), (b) and (e).



**CRIMJIG 12.25****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—COMPLAINANT UNDERAGE—  
ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated \_\_\_\_\_. Consent is not a defense to this charge.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

[1] Second, at the time of the defendant's act, \_\_\_\_\_ had not reached (his) (her) thirteenth birthday. Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

Third, the defendant was not more than 36 months older than \_\_\_\_\_.

[2] Second, at the time of the defendant's act, \_\_\_\_\_ was at least 13 but had not reached (his) (her) sixteenth birthday.

Third, the defendant was more than 24 months older than \_\_\_\_\_.

The State is not required to prove that the sexual penetration was coerced.

[3] Second, at the time of the defendant's act, \_\_\_\_\_ was at least 16 years old but had not reached (his) (her) eighteenth birthday. Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

Third, the defendant was more than 48 months older than \_\_\_\_\_.

Fourth, the defendant was in a position of authority over \_\_\_\_\_. A "position of authority" includes, but is not limited to, any person who is (a parent) (or) (is acting in the place of a parent and is charged with any rights, duties, or responsibilities of a parent) (or) (a person who is charged with any duty or responsibility for the health, welfare or supervision of a child, either independently or through another, no matter how briefly), at the time of the act.

The State is not required to prove that the sexual penetration was coerced.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

The statutory definition of "position of authority" does not contain an exclusive list of persons in a position of authority. *State v. Larson*, 520 N.W.2d 456 (Minn. App 1994), *review denied* (Minn. Oct. 14, 1994).

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of Appeals was asked to resolve a question on the meaning of “position of authority.” In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a “position of authority.” The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the “position of authority” language of the statute is “broadly defined.”

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn. App. 2006), held, against a vagueness challenge, that the statutory definition of “position of authority” included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work premises.



**CRIMJIG 12.26****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT 16 TO 18—USE OF FORCE, ETC.—  
DEFINED**

Under Minnesota law, whoever engages in sexual penetration with another person and has a significant relationship with the other person, is guilty of a crime if the other person was at least 16 years of age but under 18 years of age, and

- [1] the actor or an accomplice used force or coercion to accomplish the penetration.
- [2] the other person suffered personal injury.
- [3] the sexual abuse involved multiple acts committed over an extended period of time.

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**COMMENT**

M.S.A. § 609.344, subd. 1(g).

**CRIMJIG 12.27****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT 16 TO 18—USE OF FORCE, ETC.—  
ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated

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[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person, however slight.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, the defendant had a significant relationship with \_\_\_\_\_. A "significant relationship" means a situation in which the defendant is \_\_\_\_\_'s parent, stepparent, or guardian, or is any of the following persons related to \_\_\_\_\_ by blood,

marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or is an adult who jointly resides intermittently or regularly in the same dwelling as \_\_\_\_\_ and is not \_\_\_\_\_'s spouse.

Third, \_\_\_\_\_ was at least 16 years of age but under 18 years of age at the time of the sexual penetration.

Mistake as to (\_\_\_\_\_'s) (the victim)'s age is not a defense to this charge.

Consent is a not defense to this charge.

[1] Fourth, the defendant or an accomplice used force or coercion to accomplish the penetration. An "accomplice" is a person who aids another in the commission of a crime if (he) (she) intentionally aids the other person, or intentionally advises, hires, or requests the other person to commit it.

[The term "force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.))]

[The term "coercion" means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)']s (the victim's) will. Proof of coercion does not require proof of a specific act or threat. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.))]



Fifth, the defendant accomplished the act because \_\_\_\_\_ had such a fear of imminent great bodily harm.

[2] Fourth, the defendant caused personal injury to \_\_\_\_\_. "Personal injury" means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.

[3] Fourth, the sexual abuse involved multiple acts committed over an extended period of time.

(Fifth) (Sixth), the defendant's acts took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

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#### COMMENT

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A) require a finding that a prior conviction was committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted to the jury

## CRIMJIG 12.28

### CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE—SIGNIFICANT RELATIONSHIP— COMPLAINANT 16 TO 18—DEFINED

Under Minnesota law, whoever engages in sexual penetration with another person who is at least 16 years of age but less than 18 years of age and who had a significant relationship with that other person is guilty of a crime.

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#### COMMENT

M.S.A. § 609.344, subd. 1(f).

**CRIMJIG 12.29****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT 16 TO 18—ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated \_\_\_\_\_. Consent is not a defense to this charge.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, at the time of the defendant's act, \_\_\_\_\_ was at least 16 years old but had not reached (his) (her) eighteenth birthday.

Mistake as to (\_\_\_\_\_)’s (the victim’s) age is not a defense to this charge.



Consent is not a defense to this charge.

The State is not required to prove that the sexual penetration was coerced.

Third, the defendant had a significant relationship with \_\_\_\_\_. "Significant relationship" means a situation in which the defendant is \_\_\_\_\_'s parent, stepparent, or guardian, or any of the following persons related to \_\_\_\_\_ by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or an adult who jointly resides intermittently or regularly in the same dwelling as \_\_\_\_\_ and is not \_\_\_\_\_'s spouse.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

See M.S.A. § 609.341, subd. 15, for definition of significant relationship.

**CRIMJIG 12.30****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—PSYCHOTHERAPIST MISCONDUCT—  
DEFINED**

Under Minnesota law, whoever is a psychotherapist and engages in sexual penetration with another person when

[1] the other person is a patient of the psychotherapist, and the sexual penetration occurred during the psychotherapy session,

[2] an on-going psychotherapist-patient relationship exists between the psychotherapist and the other person, and sexual penetration occurred outside the psychotherapy session,

[3] the other person is a former patient of the psychotherapist and is emotionally dependent upon the psychotherapist,

[4] the other person is a patient or former patient, and the sexual penetration occurred by means of therapeutic deception,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.344, subd. 1 (h-j).

**CRIMJIG 12.31****CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE—PSYCHOTHERAPIST MISCONDUCT—ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated

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[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, at the time of the sexual penetration, the defendant was a psychotherapist. A "psychotherapist" is a person who is, or purports to be, a physician, psychologist, nurse, chemical dependency counselor, social worker, marriage and family counselor, mental health service provider, licensed professional counselor or other person, whether or not licensed by the State,



who performs or purports to perform psychotherapy. "Psychotherapy" means the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition.

[1] Third, \_\_\_\_\_ was a patient of the defendant, and the sexual penetration occurred during a psychotherapy session. A "patient" is a person who seeks or obtains psychotherapeutic services. Consent is not a defense to this charge.

[2] Third, \_\_\_\_\_ and the defendant had an on-going psychotherapist-patient relationship, and the sexual penetration occurred outside the psychotherapy session. Consent is not a defense to this charge.

[3] Third, \_\_\_\_\_ was a former patient of the defendant, and \_\_\_\_\_ was emotionally dependent upon the defendant. A "patient" is a person who seeks or obtains psychotherapeutic services. "Emotionally dependent" means that the nature of the former patient's emotional condition and the nature of the treatment provided by the psychotherapist are such that the psychotherapist knows or has reason to know that the former patient is unable to withhold consent to sexual penetration by the psychotherapist.

[4] Third, \_\_\_\_\_ was a patient or former patient of the defendant, and the sexual penetration occurred by means of therapeutic deception. A "patient" is a person who seeks or obtains psychotherapeutic services. "Therapeutic deception" means a representation by a psychotherapist that sexual penetration by the psychotherapist is consistent with or part of the patient's treatment. Consent is not a defense to this charge.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

COMMENT

M.S.A. § 609.344, subd. 1 (h–j).

*See* M.S.A. § 148A.01 for definitions of “emotionally dependent” and “therapeutic deception.”

**CRIMJIG 12.32****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—MEDICAL PURPOSE DECEPTION—  
DEFINED**

Under Minnesota law, whoever, by means of false representation that the penetration is for a bona fide medical purpose, engages in sexual penetration with another person is guilty of a crime.

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**COMMENT**

M.S.A. § 609.344, subd. 1(k).



**CRIMJIG 12.33****CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE—MEDICAL PURPOSE DECEPTION—ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated

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[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue, or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, the defendant accomplished the sexual penetration by means of a false representation that the penetration was for a bona fide medical purpose by a health care professional.

Consent is not a defense to this charge.

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

In *State v. Poole*, 499 N.W.2d 31 (Minn. 1993), the Supreme Court rejected the claim that the phrase "bona fide medical purpose" in statutes criminalizing sexual contact accomplished by a false representation that the contact was for a bona fide medical purpose was unconstitutionally vague as applied to a medical doctor. The Court also rejected the claim that the statute did not apply to the actions of a physician allegedly engaged in a medical examination.

**CRIMJIG 12.34****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—CLERGY MEMBER MISCONDUCT—  
DEFINED**

Under Minnesota law, whoever is or purports to be a member of the clergy and is not married to the other person and engages in sexual penetration with that person and

[1] the sexual penetration occurred during the course of a meeting in which the other person sought or received religious or spiritual advice, aid, or comfort from the clergy member in private,

[2] the sexual penetration occurred during a period of time when the person was meeting on an on-going basis with the clergy member to seek or receive religious or spiritual advice, aid, or comfort in private,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.344, subd. 1(1).



**CRIMJIG 12.35****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—CLERGY MEMBER MISCONDUCT—  
ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated  
\_\_\_\_\_.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person's body (or of any object held by one person) into the genital or anal openings of another person's body constitutes sexual penetration.

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, at the time of the sexual penetration, the defendant was or purported to be a member of the clergy.

Third, at the time of the sexual penetration, the defendant was not married to \_\_\_\_\_.

[1] Fourth, the sexual penetration occurred during the course of a meeting in which \_\_\_\_\_ sought or received religious or spiritual advice or comfort from the defendant in private. Consent is not a defense to this charge.

[2] Fourth, the sexual penetration occurred during a period of time in which \_\_\_\_\_ was meeting on an on-going basis with the defendant to seek or receive religious or spiritual advice, aid, or comfort in private. Consent is not a defense to this charge.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.344, subd. 1(1).

The constitutionality of this statute has been upheld in two cases against a challenge based upon the Establishment Clause, applying the standards set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2125, 29 L. Ed. 2d 745 (1971) (*Lemon test*). In *State v. Bussman*, 741 N.W.2d 79 (Minn. 2007), a divided Supreme Court upheld the facial constitutionality of the statute, but a plurality found that the prosecution had excessively entangled church doctrine in its case, finding the statute unconstitutional as applied to Bussman. The Court expressed its concern that the jury found defendant guilty because he violated Catholic Church doctrine and not because it was proved beyond a reasonable doubt that he committed acts in violation of the clergy sexual conduct statute. In *State v. Wenthe*, 839 N.W.2d 83 (Minn. 2013) the Court upheld the constitutionality of the statute, both facially and as applied to Wenthe. It noted that the prosecution focused its case on the acts of defendant that violated the statute, rather than whether or not defendant had violated church policy. Evidence regarding the relation between defendant and victim went to whether Wenthe was acting as a spiritual advisor, comforter or helper as required by the statute. Other evidence relating to church policies on pastoral care was minimal.

The fifth element requiring the defendant have knowledge of the religious or spiritual purpose of the meeting was set out in *State v. Wenthe*, 845 N.W.2d 222 (Minn. Ct. App. 2014), rev'd, 865 N.W.2d 293

(Minn. 2015).



**CRIMJIG 12.36****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—FORCE, MENTAL DEFICIENCY, ETC.—  
DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person and

[1] uses force or coercion to accomplish the contact,

[2] knows or has reason to know that the other person is (mentally impaired) (mentally incapacitated) (physically helpless)

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.345, subd. 1(c) and (d).

In its decision in *In Matter of Welfare of D.L.K.*, 381 N.W.2d 435 (Minn. 1986), the Supreme Court reversed *In Matter of Welfare of D.L.K.*, 362 N.W.2d 13 (Minn. App. 1985), and held that the defendant's grabbing of a female's breast constituted criminal sexual conduct in the fourth degree.

**CRIMJIG 12.37****CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE—FORCE, MENTAL DEFICIENCY, ETC.—ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts by force or coercion. [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

Second, the sexual contact occurred without the consent of \_\_\_\_\_. "Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the defendant. Consent does not mean the existence of a prior or current social relationship between the defendant and \_\_\_\_\_, or that \_\_\_\_\_ failed to resist a particular sexual act.

Third, the defendant's act was committed with sexual or aggressive intent.

Fourth, the defendant used force or coercion to accomplish the contact.

[The term "force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.))]

[The term "coercion" means [the use by the defendant of

words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. (“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.)]

Fifth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

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#### COMMENT

M.S.A. § 609.345, subd. 1(c).

In *State v. Middleton*, 386 N.W.2d 226 (Minn. 1986), the Supreme Court held that it was proper to instruct the jury that the meaning of sexual contact “accomplished by” the use of coercion could be interpreted as including sexual contact “accompanied by” the use of coercion.

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A) require a finding that a prior conviction was committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted



to the jury

**CRIMJIG 12.38****CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE—MENTALLY IMPAIRED, MENTALLY INCAPACITATED, PHYSICALLY HELPLESS—ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

Third, the defendant knew or had reason to know that \_\_\_\_\_ was (mentally impaired) (mentally incapacitated) (physically helpless).

[A] "Mentally impaired" means that a person, as the result of inadequate development or impaired intelligence or as the result of a substantial psychiatric disorder of thought or mood, lacks the judgment to give reasoned consent to sexual contact.

[B] A person is mentally incapacitated if (he) (she) lacks the judgment to give reasoned consent to sexual contact due to the influence of (alcohol) (a narcotic) (anesthetic) (any other substance) administered without (his) (her) agreement.

[C] A person is physically helpless if (he) (she) is:

- (1) asleep or not conscious;
- (2) unable to withhold consent or withdraw because of a physical condition; or
- (3) unable to communicate non-consent.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

In *State v. Middleton*, 386 N.W.2d 226 (Minn. 1986), the Supreme Court held it was proper to instruct the jury that the meaning of sexual contact "accomplished by" the use of coercion could be interpreted as including sexual contact "accompanied by" the use of coercion.

In *State v. Peng*, 524 N.W.2d 21 (Minn. App. 1994), the Court of Appeals affirmed the conviction, ruling that this jury instruction is an accurate statement of the law with regard to the definition of "physically helpless."



**CRIMJIG 12.39****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—COMPLAINANT UNDERAGE—DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person

[1] under the age of 13, when the actor is no more than 36 months older than that person,

[2] under the age of 16, when the actor is more than 48 months older than that person or is in a position of authority over that person,

[3] at least 16 years of age but less than 18, when the actor is more than 48 months older than that person and is in a position of authority over the person,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.345, subd. 1(a), (b) and (e).

**CRIMJIG 12.40****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—COMPLAINANT UNDERAGE—  
ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts [by the use of a position of authority]. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

[1] Third, at the time of the defendant's act, \_\_\_\_\_ had not reached (his) (her) thirteenth birthday.

Fourth, the defendant was not more than 36 months older than \_\_\_\_\_.

Consent is not a defense to this charge.

Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

It is immaterial whether or not the sexual contact was coerced.

[2] Third, at the time of the defendant's act, \_\_\_\_\_ was at least 13 but had not reached (his) (her) sixteenth birthday.

[Mistake as to \_\_\_\_\_'s (the victim's) age is not a defense.<sup>1</sup>]

Fourth, the defendant (was more than 48 months older than \_\_\_\_\_.)

[3] Third, at the time of the defendant's act, \_\_\_\_\_ was at least 13 but had not reached (his) (her) sixteenth birthday.

[Mistake as to \_\_\_\_\_'s (the victim's) age is not a defense.<sup>2</sup>

Fourth, defendant was in a position of authority over \_\_\_\_\_. A "position of authority" includes, but is not limited to, any person who is (a parent) (or) (is acting in the place of a parent and is charged with any rights, duties, or responsibilities of a parent) (or) (a person who is charged with any duty or responsibility for the health, welfare or supervision of a child, either independently or through another, no matter how briefly), at the time of the act.)

Consent is not a defense to this charge.

It is immaterial whether or not the sexual contact was coerced.

[4] Third, at the time of the defendant's act, \_\_\_\_\_ was at least 16 years of age but had not reached (his) (her) eighteenth birthday.

Fourth, the defendant was more than 48 months older than \_\_\_\_\_.

Fifth, defendant was in a position of authority over \_\_\_\_\_. A "position of authority" includes, but is not limited to, any person who is (a parent) (or) (is acting in the place of a \_\_\_\_\_)

#### 12.40

<sup>1</sup>The defense of mistake as to age is apparently available when the defendant is no more than 120 months older than the victim. See M.S.A. § 609.345, subd. 1(b).

<sup>2</sup>The defense of mistake as to age is apparently available when the defendant is no more than 120 months older than the victim. See M.S.A. § 609.345, subd. 1(b).



parent and is charged with any rights, duties, or responsibilities of a parent) (or) (a person who is charged with any duty or responsibility for the health, welfare or supervision of a child, either independently or through another, no matter how briefly), at the time of the act.

Consent is not a defense to this charge.

Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

It is immaterial whether or not the sexual contact was coerced.

[Fifth] [Sixth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

The Committee notes that the defense of mistake as to age is apparently available in [2] above when the defendant is no more than 120 months older than the victim, which seems inconsistent with other provisions of this statute.

The statutory definition of "position of authority" does not contain an exclusive list of persons in a position of authority. *State v. Larson*, 520 N.W.2d 456 (Minn. App 1994), *review denied* (Minn. Oct. 14, 1994).

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of Appeals was asked to resolve a question on the meaning of "position of authority." In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a "position of authority." The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the "position of authority" language of the statute is "broadly defined."

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn.

App. 2006), held, against a vagueness challenge, that the statutory definition of “position of authority” included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work premises.

**CRIMJIG 12.41****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT 16 TO 18—USE OF FORCE, ETC.—  
DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person and had a significant relationship with the other person, and the other person was at least 16 years of age but under 18 years of age, is guilty of a crime if

- [1] the actor or an accomplice used force or coercion to accomplish the penetration.
- [2] the other person suffered personal injury.
- [3] the sexual abuse involved multiple acts committed over an extended period of time.

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**COMMENT**

M.S.A. § 609.345, subd. 1(g).



**CRIMJIG 12.42****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT 16 TO 18—USE OF FORCE, ETC.—  
ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or has caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks and breast.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

Third, the defendant had a significant relationship with \_\_\_\_\_. A "significant relationship" means a situation in which the defendant is \_\_\_\_\_'s parent, stepparent, or guardian, or is any of the following persons related to \_\_\_\_\_ by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or is an adult who jointly resides intermittently or regularly in the same dwelling as \_\_\_\_\_ and is not \_\_\_\_\_'s spouse.

Fourth, \_\_\_\_\_ was at least 16 years of age but under 18 years of age at the time of the act.

[1] Fifth, the defendant or an accomplice used force or coercion to accomplish the contact. [An "accomplice" is a person who aids another in the commission of a crime if (he) (she)

intentionally aids the other person, or intentionally advises, hires, or requests the other person to commit it.]

[The term "force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the victim (or another) which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the victim to submit. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

[The term "coercion" means [the use by the defendant of words or circumstances that cause (\_\_\_\_\_) (the victim) reasonably to fear that the defendant will inflict bodily harm upon (\_\_\_\_\_) (the victim) (or another)] (or) [the use by the defendant of (confinement) (or) (superior size or strength) against (\_\_\_\_\_) (the victim) that causes (\_\_\_\_\_) (the victim) to submit to [sexual penetration] (or) [sexual contact] against (\_\_\_\_\_)’s (the victim’s) will. Proof of coercion does not require proof of a specific act or threat. ("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

[2] Fifth, the defendant caused personal injury to \_\_\_\_\_. "Personal injury" means physical pain or injury, illness, any impairment of physical condition, severe mental anguish, or pregnancy.

[3] Fifth, the sexual abuse involved multiple acts committed over an extended period of time.

Sixth, the defendant’s act(s) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

Consent is not a defense to this charge.

Mistake as to (\_\_\_\_\_)’s (the victim’s) age is not a defense.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find

that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

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COMMENT

See M.S.A. § 609.341, subd. 15, for definition of a significant relationship.

The purpose of asking the additional questions to the jury when the alleged act involves force or coercion is to capture the jury finding upon conviction. Certain aggravating factors (see Chapter 8, Appendix A) require a finding that a prior conviction was committed with force or violence. In the opinion of the Committee, the only way that information can be captured in a manner that would satisfy the requirements of *Blakely* and *Shattuck* is to ask for a jury finding of fact at the end of the trial in which the matter is first contested, unless the defendant agrees to stipulate to the fact on the record prior to the matter being submitted to the jury



**CRIMJIG 12.43****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT 16 TO 18—DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in sexual contact with another person who is at least 16 years of age but under the age of 18 when that person has a significant relationship to the other person is guilty of a crime.

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**COMMENT**

M.S.A. § 609.345, subd. 1(f).

**CRIMJIG 12.44****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—SIGNIFICANT RELATIONSHIP—  
COMPLAINANT 16 TO 18—ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

Third, at the time of the defendant's act, \_\_\_\_\_ was at least 16 years of age but had not reached (his) (her) eighteenth birthday.

Mistake as to (\_\_\_\_\_) 's (the victim's) age is not a defense to this charge.

Consent is not a defense to this charge.

The State is not required to prove that the contact was coerced.

Fourth, the defendant had a significant relationship with \_\_\_\_\_. A "significant relationship" means a situation in which the defendant is \_\_\_\_\_'s parent, stepparent, or guardian, or any of the following persons related to \_\_\_\_\_ by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt, or an adult who jointly

resides intermittently or regularly in the same dwelling as \_\_\_\_\_ and is not the \_\_\_\_\_'s spouse.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

See M.S.A. § 609.341, subd. 15, for definition of significant relationship.



**CRIMJIG 12.45****CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE—PSYCHOTHERAPIST MISCONDUCT—DEFINED**

Under Minnesota law, whoever is a psychotherapist and, with sexual or aggressive intent, engages in sexual contact when

[1] the other person is a patient of the psychotherapist, and the sexual contact occurred during the psychotherapy session,

[2] an on-going psychotherapist-patient relationship exists between the psychotherapist and the other person, and the sexual contact occurred outside the psychotherapy session,

[3] the other person is a former patient of the psychotherapist, and the person is emotionally dependent upon the psychotherapist,

[4] the other person is a patient or former patient, and the sexual contact occurred by means of therapeutic deception,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.345(h-j).

See M.S.A. § 148.01 for definitions of “emotionally dependent” and “therapeutic deception.”

In *State v. Ohrtman*, 466 N.W.2d 1 (Minn. App. 1991), the Court of Appeals held that “touching” within the meaning of the criminal sexual conduct in the fourth degree statute means contact designed primarily to create sensory feel of touch, and excludes a non-sexual hug. The Court held that to include non-sexual hugs within the definition of touching under the statute would render the statute unconstitutionally vague.

**CRIMJIG 12.46****CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE—PSYCHOTHERAPIST MISCONDUCT—ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally had sexual contact with \_\_\_\_\_. "Sexual contact" means that the defendant touched \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

Third, at the time of the sexual contact, the defendant was a psychotherapist. A "psychotherapist" is defined as a person who is or purports to be a physician, psychologist, nurse, chemical dependency counselor, social worker, marriage and family counselor, mental health service provider, licensed professional counselor or other person, whether or not licensed by the State, who performs or purports to perform psychotherapy. "Psychotherapy" means the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition.

[1] Fourth, \_\_\_\_\_ was a patient of the defendant, and the sexual contact occurred during a psychotherapy session. A patient is a person who seeks or obtains psychotherapeutic services. Consent is not a defense to this charge.

[2] Fourth, \_\_\_\_\_ and the defendant had an on-going psychotherapist-patient relationship, and the sexual contact oc-

curring outside the psychotherapy session. Consent is not a defense to this charge.

[3] Fourth, \_\_\_\_\_ was a former patient of the defendant and \_\_\_\_\_ was emotionally dependent upon the defendant. A "patient" is a person who seeks or obtains psychotherapeutic services. "Emotionally dependent" means that the nature of the former patient's emotional condition and the nature of the treatment provided by the psychotherapist are such that the psychotherapist knows or has reason to know that the former patient is unable to withhold consent to sexual contact by the psychotherapist.

[4] Fourth, \_\_\_\_\_ was a patient or former patient of the defendant, and the sexual contact occurred by means of therapeutic deception. A "patient" is a person who seeks or obtains psychotherapeutic services. "Therapeutic deception" means a representation by a psychotherapist that sexual contact by the psychotherapist is consistent with or part of the patient's treatment. Consent is not a defense to this charge.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



**CRIMJIG 12.47**

**CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—MEDICAL PURPOSE DECEPTION—  
DEFINED**

Under Minnesota law, whoever, by means of false representation that the contact is for a bona fide medical purpose, with sexual or aggressive intent, engages in sexual contact with another person is guilty of a crime.

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**COMMENT**

M.S.A. § 609.345, subd. 1(k).

**CRIMJIG 12.48****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—MEDICAL PURPOSE DECEPTION—  
ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally had sexual contact with \_\_\_\_\_. "Sexual contact" means that defendant touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts. The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

Third, the defendant accomplished the sexual contact by means of a false representation that the contact was for a bona fide medical purpose by a health care professional. Consent is not a defense to this charge.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

In *State v. Poole*, 499 N.W.2d 31 (Minn. 1993), the Supreme Court

affirmed a decision of the Court of Appeals, 489 N.W.2d 537 (Minn. App. 1992), and rejected the claim that the phrase “bona fide medical purpose” in statutes criminalizing sexual contact accomplished by a false representation that the contact was for a bona fide medical purpose was unconstitutionally vague as applied to a medical doctor. The Court also rejected the claim that the statute did not apply to the actions of a physician allegedly engaged in a medical examination.

In *State v. Peng*, 524 N.W.2d 21 (Minn. App. 1994), the Court of Appeals held that a defendant could be convicted of criminal sexual conduct in the fourth degree, based upon the false representation that sexual contact was for a bona fide medical purpose, even though the alleged representation was an implied, rather than an explicit, representation.



**CRIMJIG 12.49**

**CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—CLERGY MEMBER MISCONDUCT—  
DEFINED**

The statutes of Minnesota provide that whoever is or purports to be a member of the clergy and is not married to the other person and, with sexual or aggressive intent, engages in sexual contact with that person, and the sexual contact occurred during

- [1] the course of a meeting in which the other person sought or received religious or spiritual advice, aid, or comfort from the clergy member in private,
- [2] a period of time when the person was meeting on an on-going basis with the clergy member to seek or receive religious or spiritual advice, aid, or comfort in private,

is guilty of a crime.

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COMMENT

M.S.A. § 609.345, subd. 1(1).

**CRIMJIG 12.50****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—CLERGY MEMBER MISCONDUCT—  
ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

First, the defendant intentionally had sexual contact with \_\_\_\_\_. "Sexual contact" means that the defendant touched \_\_\_\_\_'s intimate parts, or caused the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts.

[First, the defendant intentionally touched \_\_\_\_\_'s body or the clothing covering \_\_\_\_\_'s body with seminal fluid or sperm.]

Second, the defendant's act was committed with sexual or aggressive intent.

Third, at the time of the sexual contact, the defendant was or purported to be a member of the clergy.

Fourth, at the time of the sexual contact, the defendant was not married to \_\_\_\_\_.

[1] Fifth, the sexual contact occurred during the course of a meeting in which \_\_\_\_\_ sought or received religious or spiritual advice or comfort from the defendant in private. Consent is not a defense to this charge.

[2] Fifth, the sexual contact occurred during a period of time in which \_\_\_\_\_ was meeting on an on-going basis with the defendant to seek or receive religious or spiritual advice, aid, or comfort in private. Consent is not a defense to this charge.

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

The constitutionality of this statute has been upheld in two cases against a challenge based upon the Establishment Clause, applying the standards set forth in *Lemon v. Kurtzman*, 403 U.S.602 (1971) (*Lemon* test). In *State v. Bussman*, 741 N.W.2d 79 (Minn. 2007), a divided Supreme Court upheld the facial constitutionality of the statute, but a plurality found that the prosecution had excessively entangled church doctrine in its case, finding the statute unconstitutional as applied to Bussman. The Court expressed its concern that the jury found defendant guilty because he violated Catholic Church doctrine and not because it was proved beyond a reasonable doubt that he committed acts in violation of the clergy sexual conduct statute. In *State v. Wenthe*, 839 N.W.2d 83, (Minn. 2013) the Court upheld the constitutionality of the statute, both facially and as applied to Wenthe. It noted that the prosecution focused its case on the acts of defendant that violated the statute, rather than whether or not defendant had violated church policy. Evidence regarding the relation between defendant and victim went to whether Wenthe was acting as a spiritual advisor, comforter or helper as required by the statute. Other evidence relating to church policies on pastoral care was minimal.



**CRIMJIG 12.51****CRIMINAL SEXUAL CONDUCT IN THE FIFTH  
DEGREE—DEFINED**

Under Minnesota law, whoever, with sexual or aggressive intent, engages in nonconsensual sexual contact is guilty of a crime.

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**COMMENT**

M.S.A. § 609.3451.

**CRIMJIG 12.52****CRIMINAL SEXUAL CONDUCT IN THE FIFTH  
DEGREE—ELEMENTS**

The elements of criminal sexual conduct in the fifth degree are:

[1] First, the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts [excluding the touching of the clothing covering the immediate area of the buttocks].

[2] First, the defendant intentionally removed or attempted to remove the clothing covering \_\_\_\_\_'s intimate parts or undergarments.

[3] First, the defendant caused \_\_\_\_\_'s touching of the defendant's intimate parts.

Second, the defendant's act occurred without the consent of \_\_\_\_\_. "Consent" means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the defendant.

Third, the defendant's act was done with sexual or aggressive intent.

[Fourth, the defendant has previously been convicted of or adjudicated delinquent of a violation of the first of two or more previous convictions under this statute involving non-consensual sexual contact, or M.S.A. § 617.23(b)(1), or a statute from another State in conformity with either of those sections within the last seven years.]

[Fourth, the defendant has previously been convicted or adjudicated delinquent of masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know that the minor was present, within the last seven years.]

[Fourth, the defendant has been previously convicted of a violation of [the offenses listed in M.S.A. 609.3451, subd. 3(b)]]

[Fourth] [Fifth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**Special Verdict Form on Prior Convictions—  
Bifurcated Trial**

You have (an) additional issue(s) to determine, and (it) (they) will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (is) (are): Has the defendant previously been convicted of or adjudicated delinquent of the first of two or more previous convictions under this statute involving non-consensual sexual contact, or M.S.A. § 617.23(b)(1), or a statute from another State in conformity with either of those sections in the last seven years?

Has the defendant has previously been convicted or adjudicated delinquent of masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know that the minor was present, within the last seven years.

You should answer the question "yes" or "no". If you have reasonable doubt as to the answer to the question(s), you should answer the question "no".

\_\_\_\_\_  
COMMENT

M.S.A. § 609.3451.



**CRIMJIG 12.53****CRIMINAL SEXUAL CONDUCT IN THE FIFTH  
DEGREE—VICTIM UNDER 16—DEFINED**

Under Minnesota law, whoever engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.3451(2).

**CRIMJIG 12.54****CRIMINAL SEXUAL CONDUCT IN THE FIFTH DEGREE—VICTIM UNDER 16—ELEMENTS**

The elements of criminal sexual conduct in the fifth degree are:

First, the defendant engaged in masturbation or lewd exhibition of the genitals.

Second, the defendant's act took place in the presence of \_\_\_\_\_.

Third, \_\_\_\_\_ was under the age of 16 at the time defendant's act took place.

Fourth, the defendant knew or had reason to know \_\_\_\_\_ was present at the time of the act.

[Fifth, the defendant has previously been convicted of or adjudicated delinquent of a violation of the first of two or more previous convictions under this statute involving non-consensual sexual contact, or M.S.A. § 617.23(b)(1), or a statute from another State in conformity with either of those sections within the last seven years.<sup>1</sup>]

[Fifth, the defendant has previously been convicted or adjudicated delinquent of masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know that the minor was present, within the last seven years.<sup>2</sup>]

[Fifth, the defendant has been previously convicted of a violation of [the offenses listed in M.S.A. 609.3451, subd. 3(b)]<sup>3</sup>]

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**12.54**

<sup>1</sup>The defendant can stipulate to the prior conviction and remove this element from the jury's consideration.

See *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984).

<sup>2</sup>The defendant can stipulate to the prior conviction and remove this element from the jury's consideration.

See *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984).

<sup>3</sup>The defendant can stipulate to

[Fifth] [Sixth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

See Comment to CRIMJIG 12.88 for a definition of the term "lewd."

Note that whether a statute from another state is in conformity with the statutory sections is a question of law for the judge to determine and not a jury question.

The bracketed fifth element should be used if a felony level offense has been charged, based upon prior conviction or delinquency adjudication. However, the trial court must allow the defendant to stipulate to the prior offense and remove the issue from the jury in order to prevent introduction of potentially prejudicial evidence. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984). Under Minn. R. Crim. Proc. 11.04, subd. 2, the trial court can also remove the issue of prior convictions if the defendant does not stipulate and the court feels that the introduction of such evidence would be unduly prejudicial. The Court should bifurcate the trial and submit the prior convictions as interrogatories to the jury. See CRIMJIG 12.52.

In *State v. Stevenson*, 656 N.W.2d 235 (Minn. 2003), the Supreme Court held that the phrase "in the presence of a minor" meant that the conduct must have been reasonably capable of being viewed by a minor. In *Stevenson*, the defendant was seated in his pick-up truck, masturbating, in a public park.

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the prior conviction and remove this element from the jury's consideration.

See *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984).



**CRIMJIG 12.55****CRIMINAL SEXUAL CONDUCT IN THE THIRD AND  
FOURTH DEGREES—COMPLAINANT UNDERAGE—  
MISTAKE OF AGE AS A DEFENSE**

If the defendant reasonably believed that \_\_\_\_\_ was 16 years of age or older, the defendant is not guilty of criminal sexual conduct in the (third) (or) (fourth) degree provided that the defendant is no more than 120 months older than \_\_\_\_\_. The burden of proof on this question is on the defendant. If you find that it is more likely true than not true that the defendant reasonably believed \_\_\_\_\_ was 16 years of age or older, the defendant is not guilty. If you do not find that this is more likely true than not true, this defense has not been proven.

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**COMMENT**

M.S.A. §§ 609.344, subd. 1(b); 609.345, subd. 1(b).

The Committee notes that this defense is applied only to the subdivisions listed here and may not be consistent with other provisions of the statutes.

*See State v. Kramer*, 668 N.W.2d 32 (Minn. App. 2003) on the defense of mistake of age and the defendant's burden of proof. The burden of persuasion is properly allocated to and remains with the defendant, since the defendant's alleged belief that the victim was over the age of 16 does not negate an element of the offense. Defendant must prove the affirmative defense of mistake of age by a preponderance of the evidence.

**CRIMJIG 12.56**

**CRIMINAL SEXUAL CONDUCT—DEFENDANT NOT  
GUILTY IF COHABITING WITH OR MARRIED TO  
COMPLAINANT**

**[The Committee recommends no instruction.]**

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**COMMENT**

M.S.A. § 609.349.

M.S.A. § 609.349 provides that certain subdivisions of M.S.A. §§ 609.342, 609.343, 609.344, and 609.345 are not violated where the defendant and the complainant are either married or cohabiting. The trial court should carefully examine the statutes and draft its own instructions when the issue is raised.

**CRIMJIG 12.57****CRIMINAL SEXUAL CONDUCT—DEFENSE OF  
BONA FIDE MEDICAL PURPOSE**

**Defendant asserts a defense of good faith medical purpose.**

**Sexual penetration or sexual contact done in good faith for a medical purpose is not criminal. Unless you find beyond a reasonable doubt that the act charged was not done for a medical purpose in good faith, the defendant is not guilty of criminal sexual conduct.**

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**COMMENT**

**M.S.A. § 609.348.**

**This instruction should be given only if evidence has been introduced by either side from which the trier of fact may infer that the act charged was done for a medical purpose in good faith.**



**CRIMJIG 12.58****PROSTITUTION—SOLICITATION, INDUCEMENT,  
AND PROMOTION OF PROSTITUTION—UNDER 16  
YEARS OF AGE—DEFINED**

Under Minnesota law, whoever, while acting other than as a prostitute or patron, intentionally

- [1] solicits or induces an individual under the age of 18 years to practice prostitution
- [2] promotes the prostitution of an individual under the age of 18 years
- [3] engages in the sex trafficking of an individual under the age of 18 years

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.322, subd. 1(1), (2), and (4).

For statutory definitions of terms used in CRIMJIGs 12.53–76, see M.S.A. § 609.321, subds. 1–12.

According to the Supreme Court, “in computing a person’s age . . . he . . . reaches his next year in age at the first moment of the day prior to the anniversary date of his birth.” *Nelson v. Sandkamp*, 227 Minn. 177, 34 N.W.2d 640 (1948). Unless the case is the rare one in which the act is alleged to have taken place a day or two before the victim’s sixteenth birthday, however, the Committee believes it is clearer to the jury to instruct them that the victim must not have reached the sixteenth birthday. *State v. Stangel*, 284 N.W.2d 4 (Minn. 1979).

In *State v. Kelly*, 379 N.W.2d 649 (Minn. App. 1986), the Court of Appeals repeated its holding in *State v. Ketter*, 364 N.W.2d 459 (Minn. App. 1985) that Minnesota’s prostitution statutes did not violate the defendant’s right to privacy. The Court also held that the statute was not unconstitutionally vague, and that “consent” was not a defense to a charge of prostitution. The Court further held that the crime was completed when the defendant offered sexual services for pay, and that subsequent withdrawal of the offer was not a defense.

**CRIMJIG 12.59****PROSTITUTION—SOLICITATION, INDUCEMENT,  
AND PROMOTION OF PROSTITUTION—UNDER 16  
YEARS OF AGE—ELEMENTS**

The elements of the crime are:

First, the defendant was acting other than as a prostitute or patron of a prostitute.

Second, \_\_\_\_\_ had not reached (his) (her) eighteenth birthday.

[1] Third, the defendant intentionally solicited or induced \_\_\_\_\_ to practice prostitution.

[2] Third, the defendant intentionally promoted the prostitution of \_\_\_\_\_. "Promotes the prostitution of an individual" means the defendant knowingly (1) solicited or procured patrons for a prostitute; (2) provided, leased, or otherwise permitted premises or facilities owned by the defendant to aid the prostitution of (\_\_\_\_\_); (3) owned, managed, supervised, controlled, kept or operated, either alone or with others, a place of prostitution to aid the prostitution of (\_\_\_\_\_); (4) owned, managed, supervised, controlled, operated, instituted, aided, or facilitated, either alone or with others, a business to aid the prostitution of (\_\_\_\_\_); (5) admitted a patron to a place of prostitution to aid the prostitution of (\_\_\_\_\_); or (6) transported (\_\_\_\_\_) from one point within this state to another point within or without this state, or brought an individual into this state to aid the prostitution of (\_\_\_\_\_).

[3] Third, the defendant intentionally engaged in the sex trafficking of an individual under the age of 18 years. "Sex trafficking" means (1) receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual; or (2) receiving profit or anything of value, knowing or having reason to know it is derived from receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual.

These additional elements should be added and numbered as necessary:

[Fourth, \_\_\_\_\_ (the victim) suffered bodily harm during the commission of the offense. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

[Fourth, \_\_\_\_\_) (the victim) was held in (debt bondage) (forced labor) for more than 180 days.]

[Fourth, the defendant's act involved more than one victim.]

[Fourth] [Fifth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of the elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

See M.S.A. § 609.321 for statutory definition of terms.

In *State v. McGrath*, 574 N.W.2d 99 (Minn. App. 1998), the Court of Appeals held that non-verbal conduct could constitute "solicitation" under the juvenile prostitution statute.

Note that under *Blakely v. Washington*, 542, U.S. 296 (2004), the existence of a prior conviction (see the provisions of M.S.A. 609.322, subd. 1(b)(1)) is not a question for the jury. This is to be distinguished from the case where a jury must determine whether a prior conviction occurred within a specific time frame of the present offense.



**CRIMJIG 12.60****PROSTITUTION—UNDER 18 YEARS OF AGE—  
RECEIVING PROFIT DERIVED FROM  
PROSTITUTION—DEFINED**

Under Minnesota law, whoever, while acting other than as a prostitute or patron, intentionally receives profit, knowing or having reason to know it is derived from the prostitution, or the promotion of the prostitution, of an individual who is under the age of 18 years, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.322, subd. 1(3).

**CRIMJIG 12.61****PROSTITUTION—UNDER 16 YEARS OF AGE—  
RECEIVING PROFIT DERIVED FROM  
PROSTITUTION—ELEMENTS**

The elements of the crime are:

First, the defendant was not acting as a prostitute or patron of a prostitute.

Second, the defendant intentionally received some profit, knowing or having reason to know it was derived from the prostitution or promotion of the prostitution of \_\_\_\_\_.

Third, \_\_\_\_\_ had not reached (his) (her) eighteenth birthday.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.322, subd. 1(3).

See M.S.A. § 609.321 for statutory definition of terms.

**CRIMJIG 12.62****PROSTITUTION—SOLICITATION, INDUCEMENT  
AND PROMOTION OF PROSTITUTION—DEFINED**

The statutes of Minnesota provide that whoever, while acting other than as a prostitute or patron of a prostitute, intentionally

[1] solicits or induces an individual to practice prostitution

[2] promotes the prostitution of an individual

[3] engages in sex trafficking of an individual

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.322, subd. 1a(1), (2) and (4).



**CRIMJIG 12.63****PROSTITUTION—SOLICITATION, INDUCEMENT,  
AND PROMOTION OF PROSTITUTION—ELEMENTS**

The elements of the crime are:

First, the defendant was acting other than as a prostitute or patron of a prostitute.

[1] Second, the defendant intentionally solicited or induced \_\_\_\_\_ to practice prostitution.

[2] Second, the defendant intentionally promoted the prostitution of \_\_\_\_\_. "Promotes the prostitution of an individual" means the defendant knowingly (1) solicited or procured patrons for (\_\_\_\_\_); (2) provided, leased, or otherwise permitted premises or facilities owned by the defendant to aid the prostitution of (\_\_\_\_\_); (3) owned, managed, supervised, controlled, kept or operated, either alone or with others, a place of prostitution to aid the prostitution of (\_\_\_\_\_); (4) owned, managed, supervised, controlled, operated, instituted, aided, or facilitated, either alone or with others, a business to aid the prostitution of (\_\_\_\_\_); (5) admitted a patron to a place of prostitution to aid the prostitution of (\_\_\_\_\_); or (6) transported (\_\_\_\_\_) from one point within this state to another point within or without this state, or brought an individual into this state to aid the prostitution of (\_\_\_\_\_).

[3] Second, the defendant engaged in sex trafficking of \_\_\_\_\_. "Sex trafficking" means (1) receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual; or (2) receiving profit or anything of value, knowing or having reason to know it is derived from receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual.

These additional elements should be added and numbered as necessary:

[Fourth, \_\_\_\_\_ (the victim) suffered bodily harm during

the commission of the offense. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

[Fourth, \_\_\_\_\_] (the victim) was held in (debt bondage) (forced labor) for more than 180 days.]

[Fourth, the defendant's act involved more than one victim.]

[Third] [Fourth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been so proved, the defendant is not guilty.

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COMMENT

*See M.S.A. § 609.321 for statutory definition of terms.*

**CRIMJIG 12.64****PROSTITUTION—RECEIVING PROFIT DERIVED  
FROM PROSTITUTION—DEFINED**

Under Minnesota law, whoever, while acting other than as a prostitute or patron, intentionally receives profit, knowing or having reason to know it is derived from the prostitution, or the promotion of the prostitution, of an individual, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.322, subd. 1(3).



**CRIMJIG 12.65****PROSTITUTION—RECEIVING PROFIT DERIVED  
FROM PROSTITUTION—ELEMENTS**

The elements of the crime are:

First, the defendant was not acting as a prostitute or patron of a prostitute.

Second, the defendant intentionally received some profit, knowing or having reason to know it was derived from the prostitution or promotion of the prostitution of \_\_\_\_\_.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.322, subd. 1(3).

See M.S.A. § 609.321 for statutory definition of terms.

**CRIMJIG 12.66****PROSTITUTION—ENGAGES IN PROSTITUTION,  
HIRES, OFFERS, OR AGREES TO SEX—DEFINED**

The statutes of Minnesota provide that whoever intention-  
ally

[1] engages in prostitution with an individual (under the age of 13 years) (under the age of 16 years but at least 13 years) (under the age of 18 years but at least 16 years) (18 years of age or above)

[2] hires, offers, or agrees to hire an individual (under the age of 13 years) (under the age of 16 years but at least 13 years) (under the age of 18 years but at least 16 years) (18 years of age or above) to engage in sexual penetration or sexual contact,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.324, subds. 1, 3. See Comment to CRIMJIG 12.58.

**CRIMJIG 12.67****PROSTITUTION—ENGAGES IN PROSTITUTION,  
HIRES, OFFERS, OR AGREES TO SEX—ELEMENTS**

The elements of the crime are:

[1] First, \_\_\_\_\_ had not reached (his) (her) thirteenth birthday.

[a] Second, the defendant intentionally engaged in prostitution with \_\_\_\_\_.

[b] Second, the defendant intentionally hired, offered, or agreed to hire \_\_\_\_\_ to engage in sexual penetration or sexual contact.

[2] First, \_\_\_\_\_ had not reached (his) (her) sixteenth birthday but had at least reached (his) (her) thirteenth birthday.

[a] Second, the defendant intentionally engaged in prostitution with \_\_\_\_\_.

[b] Second, the defendant intentionally hired, offered, or agreed to hire \_\_\_\_\_ to engage in sexual penetration or sexual contact.

[3] First, \_\_\_\_\_ had not reached (his) (her) eighteenth birthday but had at least reached (his) (her) sixteenth birthday.

[a] Second, the defendant intentionally engaged in prostitution with \_\_\_\_\_.

[b] Second, the defendant intentionally hired, offered, or agreed to hire \_\_\_\_\_ to engage in sexual penetration or sexual contact.

[4] First, \_\_\_\_\_ was at least eighteen years old.

[a] Second, the defendant intentionally engaged in prostitution with \_\_\_\_\_.

[b] Second, the defendant intentionally hired, offered, or



agreed to hire \_\_\_\_\_ to engage in sexual penetration or sexual contact.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.324, subds. 1, 3.

See Comment, CRIMJIG 12.58 and M.S.A. § 609.321 for statutory definition of terms.

**CRIMJIG 12.68****PROVIDING RESIDENCE FOR MINOR ENGAGED  
IN PROSTITUTION—DEFINED**

Under Minnesota law, whoever, if not related by blood, adoption, or marriage to a minor, permits the minor to temporarily or permanently reside in the person's dwelling without the consent of the minor's parents or guardian, and who knows or has reason to know that the minor is engaging in prostitution, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.324, subd. 1a.

**CRIMJIG 12.69****PROVIDING RESIDENCE FOR MINOR ENGAGED  
IN PROSTITUTION—ELEMENTS**

The elements of providing a residence for a minor engaged in prostitution are:

First, the defendant was not related by blood, adoption, or marriage to \_\_\_\_\_.

Second, \_\_\_\_\_ was under the age of eighteen years.

Third, the defendant permitted \_\_\_\_\_ to reside in the defendant's dwelling without the consent of \_\_\_\_\_'s parents or guardian.

Fourth, the defendant knew or had reason to know that \_\_\_\_\_ was engaging in prostitution. Minnesota statutes provide that whoever solicits or accepts a solicitation to engage for hire in sexual penetration or contact is engaged in prostitution.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

*See M.S.A. § 609.321 for statutory definition of terms.*



**CRIMJIG 12.70**

**PROSTITUTION IN A PUBLIC PLACE—DEFINED**

The statutes of Minnesota provide that whoever intentionally

[1] engages in prostitution with an individual 18 years of age or older

[2] hires or offers or agrees to hire an individual 18 year of age or older to engage in sexual penetration or sexual contact while in a public place is guilty of a crime.

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**COMMENT**

M.S.A. § 609.324, subd. 2.

*See* Comment to CRIMJIG 12.58.

**CRIMJIG 12.71****PROSTITUTION IN A PUBLIC PLACE—ELEMENTS**

The elements of the crime are:

[1] First, the defendant intentionally engaged in prostitution with an individual 18 years of age or older. "Prostitution" means engaging or offering or agreeing to engage for hire in sexual penetration or sexual contact. "Sexual contact" means any of the following acts, if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual impulses: (1) the intentional touching by an individual of a prostitute's intimate parts; or (2) the intentional touching by a prostitute of another's individual's intimate parts. "Sexual penetration" means any of the following acts, if for the purpose of satisfying sexual impulses: sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, into the genital or anal opening of an individual's body by any part of another individual's body or any object used for the purpose of satisfying sexual impulses. Emission of semen is not necessary.

Second, the defendant did so while in a public place. [A "public place" means a public street or sidewalk, a pedestrian skyway system,<sup>1</sup> a hotel, motel, steam room, sauna, massage parlor, shopping mall, or other public shopping areas, or other place of public accommodation, or a place licensed to sell intoxicating liquor, wine, nonintoxicating malt beverages, or food, or a motor vehicle located on a public street, alley, or parking lot ordinarily used by or available to the public though not used as a matter of right and a driveway connecting such a parking lot with a street or highway.]

[2] First, the defendant intentionally hired or offered or agreed to hire an individual 18 years of age or older to engage in sexual penetration or sexual contact. "Sexual contact" means any of the following acts, if the acts can reasonably be construed

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12.71

is defined in M.S.A. § 469.125, subd. 4.

<sup>1</sup>A "pedestrian skyway system"

as being for the purpose of satisfying the actor's sexual impulses: (1) the intentional touching by an individual of a prostitute's intimate parts; or (2) the intentional touching by a prostitute of another's individual's intimate parts. "Sexual penetration" means any of the following acts, if for the purpose of satisfying sexual impulses: sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, into the genital or anal opening of an individual's body by any part of another individual's body or any object used for the purpose of satisfying sexual impulses. Emission of semen is not necessary.

Second, the defendant did so while in a public place. [A "public place" means a public street or sidewalk, a pedestrian skyway system,<sup>2</sup> a hotel, motel, steam room, sauna, massage parlor, shopping mall, or other public shopping areas, or other place of public accommodation, or a place licensed to sell intoxicating liquor, wine, nonintoxicating malt beverages, or food, or a motor vehicle located on a public street, alley, or parking lot ordinarily used by or available to the public though not used as a matter of right and a driveway connecting such a parking lot with a street or highway.]

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

\_\_\_\_\_  
**COMMENT**

See M.S.A. § 609.321 for definition of "prostitution," "sexual contact," and "sexual penetration."

*See Comment to CRIMJIG 12.58.*

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<sup>2</sup>A "pedestrian skyway system" is defined in M.S.A. § 469.125, subd. 4.



## CRIMJIG 12.72

### LOITERING WITH INTENT TO COMMIT PROSTITUTION—DEFINED

Under Minnesota law, a person who loiters (on the streets) (in a public place) (in a place open to the public) with intent to (solicit for immoral purposes) (participate in prostitution) is guilty of a crime.

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#### COMMENT

M.S.A. § 609.3243.

**CRIMJIG 12.73****LOITERING WITH INTENT TO COMMIT  
PROSTITUTION—ELEMENTS**

**The elements of loitering are:**

**First, the defendant was loitering (on the streets) (in a public place) (in a place open to the public). "Loitering" means to be slow in moving, delaying, lingering, sauntering, or lagging behind.**

**Second, the defendant was a person who intended to (solicit for immoral purposes) (participate in prostitution).**

**Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.**

**If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.**

**CRIMJIG 12.74****PROSTITUTION—ADDITIONAL ISSUE—SCHOOL  
ZONE/PARK ZONE**

If you find the defendant guilty, you have an additional issue to consider, and it will be put to you in the form of questions that will appear on the verdict form. The questions are: Was the defendant acting other than as a prostitute? When defendant committed the act, was (he) (she) in a (school zone) (park zone)? [A "school zone" is any property owned, leased, or controlled by a school district or an organization operating a nonpublic school<sup>1</sup> where an elementary, middle, secondary school, secondary vocational center, or other school providing educational services for grades one through twelve is located or used for educational purposes, or where extracurricular or co-curricular activities are regularly provided. School zone also includes, while school children are waiting for a bus, school bus stops established by a school board.] [A "park zone" is an area designated as a public park by the federal government, the State, a local unit of government, a park district board, or a park and recreation board in a city of the first class. Park zone includes the area (within three hundred feet) (or) (one city block), [whichever distance is greater,] of the park boundary.] You will answer these questions "yes" or "no." If you have a reasonable doubt as to an answer, you will answer the question "no."

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**COMMENT**

M.S.A. § 609.3242.

See M.S.A. § 152.01, subds. 12a, 14a for the definitions of school zone and park zone.

In cities where no grid system is present, the term "one city block" does not apply and the transaction must take place within 300 feet of the park for the statute to apply. See *State v. Estrella*, 700 N.W.2d 496 (Minn. App. 2005).

When land surrounding a public park is divided into rectangular

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**12.74**

the definition of a non-public school.

<sup>1</sup>See M.S.A. § 123.932, subd. 3 for



blocks bounded by city streets, the area “within one city block . . . of the park boundary” include the entire area of block adjacent to the park. *State v. Carufel*, 783 N.W.2d 539 (Minn. 2010). This holding would presumably also apply to a school zone.

**CRIMJIG 12.75**

**SOLICITATION OF A CHILD TO ENGAGE IN  
SEXUAL CONDUCT—DEFINED**

Under Minnesota law, whoever is eighteen years of age or older and who, with the intent to engage in sexual conduct, solicits a child 15 years of age or younger to engage in sexual conduct is guilty of a crime.

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COMMENT

M.S.A. § 609.352.

**CRIMJIG 12.76****SOLICITATION OF A CHILD TO ENGAGE IN  
SEXUAL CONDUCT—ELEMENTS**

The elements of solicitation of a child to engage in sexual conduct are:

First, the defendant was eighteen years of age or older.

Second, \_\_\_\_\_ was fifteen years of age or younger. Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

Third, the defendant solicited \_\_\_\_\_ to engage in sexual conduct. "To solicit" means to command, entreat, or attempt to persuade (in person) (by telephone) (by letter) (by computerized or other electronic means).

"Sexual conduct" means:

[1] Sexual contact with the individual's primary genital area.

[2] Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, into the genital or anal openings of the child's body or any part of the defendant's body with any object used by the defendant for this purpose. [Emission of semen is not necessary to accomplish this element.]

[3] Performance in any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that depicts any of the following:

[A] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

[B] Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a



person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

[C] Masturbation or lewd exhibitions of the genitals.

[D] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

Fourth, the defendant acted with the intent that \_\_\_\_\_ engage in sexual conduct.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

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#### COMMENT

In *State v. Coonrod*, 652 N.W.2d 715 (Minn. App. 2002), a case involving a "sting" conducted by a postal inspector working with Internet Crimes Against Children Task Force, the Court of Appeals found that the statutory requirement that defendant solicit a "specific person" for purposes of the child solicitation statute does not require solicitation of an actual person. A fictional persona created by electronic means was sufficiently a "specific person, as distinguished from an 'actual person,' " to support a prosecution for soliciting.

**CRIMJIG 12.77****SEXUAL PERFORMANCE—USE OF MINORS—  
DEFINED**

Under Minnesota law, whoever, knowing or having reason to know that the conduct intended is a sexual performance, promotes, employs, uses, or permits a minor to engage in or assist others to engage minors in posing or modeling, alone or with others, in any sexual performance or pornographic work, is guilty of a crime.

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**COMMENT**

M.S.A. § 617.246, subd. 2.

**CRIMJIG 12.78****SEXUAL PERFORMANCE—USE OF MINORS—  
ELEMENTS**

The elements of use of minor(s) to engage in a sexual performance are:

First, \_\_\_\_\_ was a minor at the time the (sexual performance) (or) (pornographic work) was (created) (or) (altered). "Minor" means any person under the age of eighteen.

Second, the defendant promoted, employed, used, or permitted \_\_\_\_\_ to engage in or assist others to engage in posing or modeling, alone or with others, in a (sexual performance) (or) (pornographic work).

"Promote" means to produce, direct, publish, manufacture, issue, or advertise.

"Sexual performance" means any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that depicts sexual conduct.

"Sexual conduct" means any of the following:

- [1] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.
- [2] Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed;
- [3] Masturbation;
- [4] Lewd exhibitions of the genitals.



- [5] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

“Pornographic work” means:

- [1] an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor;
- [2] any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical or other means that:
- (i) uses a minor to depict actual or simulated sexual conduct;
  - (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct (An identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction);
  - (iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

Third, the defendant knew or had reason to know that the conduct intended was a sexual performance or pornographic work.

[Consent to the (sexual performance) (pornographic work) by the minor or (parent) (guardian) (custodian) is not a defense to this charge.]

[Mistake by the defendant as to the minor’s age is not a defense to this charge.]

Fourth, the defendant's acts took place on or about \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 617.246, subd. 2.

In *State v. Fan*, 445 N.W.2d 243 (Minn. App. 1989), *cert. denied*, 494 U.S. 1030, 110 S. Ct. 1480, 108 L.Ed.2d 617 (1990), the Court of Appeals rejected a claim that M.S.A. § 617.26, subd. 2 was unconstitutionally vague and overbroad. The Court also held that the statute was not unconstitutionally vague in use of the phrase "lewd exhibition of the genitals," and held that exclusion of a mistake of age defense does not impermissibly chill free speech in violation of the First Amendment.

In *State v. White*, 464 N.W.2d 585 (Minn. App. 1990), *cert. denied*, 502 U.S. 819, 112 S. Ct. 77, 116 L.Ed.2d 51 (1991), the Court of Appeals held that in a prosecution for violation of M.S.A. § 617.246 excluding "mistake of age" as a defense did not invalidate the statute, either on the grounds of the First Amendment or on due process grounds under the Fourteenth Amendment.

In *State v. Peterson*, 535 N.W.2d 689 (Minn. App. 1995), the Court of Appeals held that its decision in *State v. White*, *supra*, was not overruled by the decision of the United States Supreme Court in *United States v. X-Citement Video*, 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). The Court reaffirmed that the First Amendment of the Constitution does not require that a mistake of age defense be available in a prosecution for the crime of use of a minor in a sexual performance under M.S.A. § 617.246, subd. 2.

**CRIMJIG 12.79****SEXUAL PERFORMANCE—USE OF MINORS—  
OPERATION OR OWNERSHIP OF BUSINESS—  
DEFINED**

Under Minnesota law, whoever owns or operates a business in which a work is disseminated depicting a minor in a sexual performance, and who knows the content and character of the work that is disseminated, is guilty of a crime.

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**COMMENT**

M.S.A. § 617.246, subd. 3.



**CRIMJIG 12.80****SEXUAL PERFORMANCE—USE OF MINORS—  
OPERATION OR OWNERSHIP OF BUSINESS—  
ELEMENTS**

The elements of use of minor(s) to engage in sexual performance are:

First, \_\_\_\_\_ was a minor at the time of the sexual performance. "Minor" means any person under the age of eighteen. It is not necessary for the State to prove that \_\_\_\_\_ was a minor at the time the work was disseminated.

Second, the defendant owned or operated a business in which a work was disseminated depicting a minor in a sexual performance.

"Work" means an original or reproduction of a picture, film, photograph, negative, slide, video tape, video disc, or drawing.

"Sexual performance" means any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that depicts sexual conduct.

"Sexual conduct" means any of the following:

- [1] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.
- [2] Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.
- [3] Masturbation or lewd exhibitions of the genitals.
- [4] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human

male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

“Disseminate” means to distribute, give, sell, lease, or display.

Third, the defendant knew the content and character of the disseminated work.

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[Consent to the sexual performance by the minor or (his) (her) (parent) (guardian) (custodian) is not a defense to this charge.]

[Mistake by the defendant as to the minor’s age is not a defense to this charge.]

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COMMENT

M.S.A. § 617.246, subd. 3.

**CRIMJIG 12.81****SEXUAL PERFORMANCE—USE OF MINORS—  
DISSEMINATION—DEFINED**

Under Minnesota law, whoever knowing, or with reason to know its content and character, disseminates for profit a work depicting a minor in a sexual performance is guilty of a crime.

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**COMMENT**

M.S.A. § 617.246, subd. 4.



**CRIMJIG 12.82****SEXUAL PERFORMANCE—USE OF MINORS—  
DISSEMINATION—ELEMENTS**

The elements of dissemination for profit of a work depicting a minor(s) in a sexual performance are:

First, \_\_\_\_\_ was a minor at the time of the sexual performance. "Minor" means any person under the age of eighteen. It is not necessary that \_\_\_\_\_ was a minor at the time the work was disseminated.

Second, the defendant disseminated for profit a work depicting a minor in a sexual performance.

"Disseminate" means to distribute, give, sell, lease, or display.

"Work" means an original or reproduction of a picture, film, photograph, negative, slide, video tape, video disc, or drawing.

"Sexual performance" means any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that depicts sexual conduct.

"Sexual conduct" means any of the following:

[1] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

[2] Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

[3] Masturbation or lewd exhibitions of the genitals.

[4] Physical contact or simulated physical contact with the

clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

“For profit” means that the defendant expected to receive economic gain from the distribution. It is not necessary for the State to prove the defendant actually received a profit or economic gain.

Third, the defendant knew or had reason to know the content and character of the work.

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[Consent to the sexual performance by the minor or (his) (her) (parent) (guardian) (custodian) is not a defense to this charge.]

[Mistake by the defendant as to the minor’s age is not a defense to this charge.]

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COMMENT

M.S.A. § 617.246, subd. 4.

**CRIMJIG 12.83****OBSCENE MATERIALS—DISTRIBUTION—DEFINED**

Under Minnesota law, whoever knowingly exhibits, sells, prints, offers to sell, gives away, circulates, publishes, distributes, or attempts to distribute any obscene book, magazine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, videotape, script, image, instrument, statue, drawing, or other article that is obscene, is guilty of a crime.

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**COMMENT**

M.S.A. § 617.241, subd. 2(a) and subd. 2(e).



**CRIMJIG 12.84****OBSCENE MATERIALS—DISTRIBUTION—  
ELEMENTS**

The elements of distribution of obscene materials are:

First, the defendant knowingly exhibited, sold, printed, offered to sell, gave away, circulated, published, distributed, or attempted to distribute an obscene book, magazine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, videotape, image, instrument, statue, drawing, or other article that is obscene.

“Obscene” means that the work, taken as a whole, appeals to the prurient interest in sex, and depicts or describes sexual conduct in a patently offensive manner, and the work, taken as a whole, does not have serious literary, artistic, political, or scientific value. In determining whether or not such work is an obscene work, you must find:

- [1] That the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex and,
- [2] That the average person, applying contemporary community standards, would find that the work depicts sexual conduct in a patently offensive manner, which includes any of the following depicted sexual conduct:
  - [A] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.
  - [B] Sadomasochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a sexually revealing costume, or the condition of being fettered, bound, or otherwise physically restricted on the part of one so clothed or who is nude.

[C] Masturbation, excretory functions, or lewd exhibitions of the genitals, including any explicit, close-up representation of a human genital organ.

[D] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification; and

[3] That the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Second, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 617.241, subd. 2(a).

In *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L.Ed.2d 439 (1987), the Supreme Court held that the jury should not be instructed to apply community standards in deciding the value question. It held that only the first and second parts of the *Miller* test, i.e., appeal to prurient interest, and patent offensiveness, should be decided with reference to "contemporary community standards."

In *State v. Davidson*, 481 N.W.2d 51 (Minn. 1992), the Supreme Court overruled *State v. Davidson*, 471 N.W.2d 691 (Minn.App.1991), and held that M.S.A. § 617.241 satisfied federal and state constitutional guarantees of free speech and press, and due process, and the constitutional right to privacy.

## CRIMJIG 12.85

### OBSCENE PERFORMANCE—DEFINED

Under Minnesota law, whoever knowingly produces, presents, participates in, or directs an obscene play, motion picture, dance, or other exhibition performed before an audience is guilty of a crime.

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#### COMMENT

M.S.A. § 617.241, subd. 2(b).



**CRIMJIG 12.86****OBSCENE PERFORMANCE—ELEMENTS**

The elements of participating in an obscene performance are:

First, the defendant knowingly produced, presented, or participated in or directed an obscene performance.

A performance means a play, motion picture, dance, or other exhibition performed before an audience.

“Obscene” means that the performance, taken as a whole, appeals to the prurient interest in sex, and depicts or describes sexual conduct in a patently offensive manner, and the performance, taken as a whole, does not have serious literary, artistic, political, or scientific value.

In determining whether or not a performance is obscene, you must find:

[1] That the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex, and

[2] That the average person, applying contemporary community standards, would find that the work depicts sexual conduct in a patently offensive manner, which includes any of the following depicted sexual conduct:

[A] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

[B] Sadomasochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in an undergarment or in a sexually revealing costume, or the condition of being fettered, bound, or otherwise

physically restricted on the part of one so clothed or who is nude.

[C] Masturbation, excretory functions, or lewd exhibitions of the genitals, including any explicit, close-up representation of a human genital organ.

[D] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification; and

[3] That the work, taken as a whole, lacks serious literary artistic, political, or scientific value.

Second, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 617.241, subd. 2(b).

In *State v. Davidson*, 481 N.W.2d 51 (Minn. 1992), the Supreme Court held that M.S.A. § 617.241 satisfied federal and state constitutional guarantees of free speech and press, and due process, and the constitutional right to privacy.

**CRIMJIG 12.87****INDECENT EXPOSURE—DEFINED**

The statutes of Minnesota provide that whoever in any public place or any place where others are present

[1] willfully and lewdly exposes the person's body or the private parts thereof,

[2] procures another to expose private parts,

[3] engages in any open or gross lewdness or lascivious behavior or public indecency,

is guilty of a crime.

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**COMMENT**

M.S.A. § 617.23.

*State v. Stevenson*, 656 N.W.2d 235 (Minn. 2003) held that an intent to be indecent may be inferred when the defendant's conduct is performed in a place so public and open it is likely to be observed. Note, however, that, as a general rule, instructions involving permissive inferences are not to be given. See *State v. Litzau*, 650 N.W.2d 177 (Minn. 2002) (citing *State v. Olson*, 482 N.W.2d 212 (Minn. 1992)).

In *City of Mankato v. Fetchenhier*, 363 N.W.2d 76 (Minn. App. 1985), the Court of Appeals upheld the constitutionality of that portion of M.S.A. § 617.23 that prohibits "any open or gross lewdness or lascivious behavior, or any public indecency". The statute was challenged as unconstitutionally vague and overbroad. The defendant allegedly rubbed one or two hands up the complainant's upper thigh and over each side of her buttocks when the complainant bent over to look at merchandise on a shelf. The Court rejected application of the overbreadth doctrine, on the ground that M.S.A. § 617.23 does not purport to regulate any conduct protected by the First Amendment. The Court declined to declare the statute void for vagueness as applied to the facts of the case, because "defendant could have had no reasonable doubt that his actions in fondling a woman's thigh and buttocks were 'open or gross lewdness or lascivious behavior' or a 'public indecency'."

In *In the Welfare of C.S.K.*, 438 N.W.2d 375 (Minn. App. 1988), the Court of Appeals held that while private consensual exposure of one's private parts is not prohibited by the indecent exposure statute, it is not necessary for the prosecution to prove that the exposure occurred in a public place.



In *State v. Schramel*, 581 N.W.2d 400 (Minn. App. 1998) the Court of Appeals held that an intent to offend the sensibilities of others is not an element of the crime of indecent exposure.

## CRIMJIG 12.88

## INDECENT EXPOSURE—ELEMENTS

The elements of indecent exposure are:

[1] First, the defendant willfully and lewdly exposed the defendant's body or private parts. An act is willful and lewd if it was done with deliberate intent to be lewd or indecent.

[2] First, the defendant procured (\_\_\_\_\_) (another) to expose their private parts.

[3] First, the defendant engaged in any open or gross lewdness or lascivious behavior or any public indecency.

Second, the defendant's act took place in a public place or any place where others were present.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

Intent may be established by the location in which the incident took place, where the alleged criminal conduct occurs in public. However, where the act does not occur in a public place, or at least in a location where it is otherwise certain to be observed, there must be further evidence of intent than merely the act itself. *State v. Prince*, 296 Minn. 490, 206 N.W.2d 660 (1973); *State v. Peery*, 224 Minn. 346, 28 N.W.2d 851 (1947).

Where both conduct and speech are involved in the alleged criminal act, constitutional questions may arise. Under such circumstances, the court should determine whether the activities charged constitute offensive conduct, which the State can regulate, or a form of protected symbolic speech. *State v. Ray*, 292 Minn. 104, 193 N.W.2d 315 (1971). *City of Mankato v. Fetchenhier*, 363 N.W.2d 76 (Minn. App. 1985) held that there is no "conduct protected under the First Amendment which

M.S.A. § 617.23 purports to regulate, nor [can] any such application [be envisioned].” The jury will not be involved in this determination, since it involves a legal, rather than a factual, issue.

The terms contained in the first element are defined in *City of Mankato, v. Fetchenhier*, 363 N.W.2d 76 (Minn. App. 1985). Specifically, “lewdness” is defined as “the quality of being openly lustful and indecent,” and “lasciviousness” is defined as “wanton lustfulness.” The Court in *Fetchenhier* stated that “[t]hese terms, as well as the term indecency, have a reliable and sufficiently definite meaning to the ordinary citizen.”

This offense may be charged as a gross misdemeanor if the defendant has been previously convicted of a violation of this statute, M.S.A. §§ 609.342 to 609.3451, or a statute from another State in conformity with any of those section, or if the crime occurred in the presence of a minor under the age of 16. Under *State v. Berkelman*, 355 N.W.2d 394 (Minn.1984), the prior conviction becomes an element that the State must prove at trial and that the defendant has a right to have a jury decide, since it changes the nature of the crime from a misdemeanor, and the instruction must be appropriately modified. The trial court must allow the defendant to remove from the jury the issue of whether the defendant has a prior conviction, in order to prevent introduction of the potentially prejudicial evidence. *State v. Davidson*, 351 N.W.2d 8 (Minn.1984).



**CRIMJIG 12.89****INDECENT EXPOSURE IN PRESENCE OF A MINOR  
UNDER 16—DEFINED**

Under Minnesota law, whoever in any public place or any place where others are present

[1] willfully and lewdly exposes the person's body or the private parts thereof,

[2] procures another to expose private parts,

[3] engages in any open or gross lewdness or lascivious behavior or public indecency,

in the presence of a minor under the age of 16 is guilty of a crime.

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**COMMENT**

M.S.A. 617.23, subd. 2.

In *State v. Stevenson*, 656 N.W.2d 235 (Minn. 2003), the Supreme Court held that the phrase “in the presence of a minor” meant that the conduct must have been reasonably capable of being viewed by a minor. In this case, the defendant was seated in his pick-up truck, masturbating, in a public park. The Court also held that an intent to be indecent may be inferred when the defendant's conduct is performed in a place so public and open it is likely to be observed. Note, however, that, as a general rule, instructions involving permissive inferences are not to be given. See *State v. Litzau*, 650 N.W.2d 177 (Minn.2002) (citing *State v. Olson*, 482 N.W.2d 212 (Minn.1992)).

**CRIMJIG 12.90****INDECENT EXPOSURE IN PRESENCE OF A MINOR  
UNDER 16—ELEMENTS**

The elements of indecent exposure are:

[1] First, the defendant willfully and lewdly exposed the defendant's body or private parts. An act is willful and lewd if it was done with deliberate intent to be lewd or indecent.

[2] First, the defendant procured (\_\_\_\_\_) (another) to expose (his) (her) private parts.

[3] First, the defendant engaged in any open or gross lewdness or lascivious behavior or any public indecency.

Second, the (defendant's) act (of the person defendant procured) took place in a public place or any place where others were present.

Third, the (defendant's) act (of the person defendant procured) took place in the presence of \_\_\_\_\_, a minor under the age of 16 years. "In the presence of" means that it was committed [in place where (a minor) (\_\_\_\_\_) was reasonably capable of viewing it] [where a reasonable person would have reason to know that a minor might see it].

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

In *State v. Stevenson*, 656 N.W.2d 235 (Minn. 2003), the Supreme Court held that the phrase "in the presence of a minor" meant that the conduct must have been reasonably capable of being viewed by a minor. In *Stevenson*, the defendant was seated in his pick-up truck, masturbat-

ing, in a public park. The Court also held that an intent to be indecent may be inferred when the defendant's conduct is performed in a place so public and open it is likely to be observed. Note, however, that, as a general rule, instructions involving permissive inferences are not to be given. See *State v. Litzau*, 650 N.W.2d 177 (Minn.2002) (citing *State v. Olson*, 482 N.W.2d 212 (Minn. 1992)).



**CRIMJIG 12.91**

**OWNING OR OPERATING A DISORDERLY HOUSE—  
DEFINED**

Under Minnesota law, whoever (owns) (leases) (operates) (manages) (maintains) (conducts) (invites or attempts to invite others to visit or remain in) a disorderly house is guilty of a crime.

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COMMENT

M.S.A. § 609.33, subd. 2.

**CRIMJIG 12.92****OWNING OR OPERATING A DISORDERLY HOUSE—  
ELEMENTS**

The elements of (owning) (operating) (leasing) (managing) (maintaining) (conducting) (inviting or attempting to invite others to visit or remain in) a disorderly house are:

First, the defendant (owned) (leased) (operated) (managed) (maintained) (conducted) (invited or attempted to invite others to visit or remain in) the (building) (dwelling) (place) (establishment) (premises) in question.

Second, the (building) (dwelling) (place) (establishment) (premises) constituted a disorderly house.

[A “disorderly house” is a (building) (dwelling) (place) (establishment) (premises) in which actions or conduct habitually occur in violation of laws relating to (the sale of intoxicating liquor or non-intoxicating malt liquor) (gambling) (prostitution or acts relating to prostitution) (the sale or possession of controlled substances).]

[Evidence of (unlawful sales of intoxicating liquor or non-intoxicating malt liquor) (prostitution or acts relating to prostitution) (gambling or acts relating to gambling) is ordinarily a circumstance from which the inference may reasonably be drawn that, in light of surrounding circumstances shown by the evidence in the case, a disorderly house existed. However, you are not required to draw such an inference.]

Third, the defendant knew of the activities taking place in the (building) (dwelling) (place) (establishment) (premises).

[Evidence of sales of intoxicating liquor or non-intoxicating malt liquor between the hours of 1:00 a.m. and 8:00 a.m., while a person is within a disorderly house, is ordinarily a circumstance from which the inference may reasonably be drawn that, in light of surrounding circumstances shown by evidence in the case, the defendant knew it to be a disorderly house. However, you are not required to draw such an inference.]

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

The definition of "disorderly house" is found in M.S.A. § 609.33, subd. 1. The judge should read the parenthetical provision in the bracketed portions under the second element that define the criminal conduct that allegedly occurred on the premises. It may be necessary to read to the jury the relevant statutory definition of the offense that allegedly habitually occurred on the premises.



**CRIMJIG 12.93****INCEST—DEFINED**

Under Minnesota law, whoever has sexual intercourse with another person nearer of kin than first cousin, with knowledge of that relationship, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.365.

The statutory language “computed by rules of the civil law, whether of the half or the whole blood” is not referred to, since the appropriate relationships are defined in the elements, making the reference unnecessary.

**CRIMJIG 12.94****INCEST—ELEMENTS**

The elements of incest are:

First, the defendant had sexual intercourse with \_\_\_\_\_. Sexual intercourse consists of any penetration, however slight, of the penis into the female genital opening.

[Emission of semen is not necessary to accomplish sexual intercourse.]

[Consent is not a defense to this charge.]

[1] Second, \_\_\_\_\_ was the defendant's (child) (grand-child) (parent) (grandparent) (brother) (sister). (Two persons are brother and sister if they have at least one parent in common.)

[2] Second, (the defendant) (\_\_\_\_\_) was the (brother) (sister) of (\_\_\_\_\_'s) (defendant's) (father) (mother). (Two persons are brother and sister if they have at least one parent in common.)

Third, the defendant knew of the relationship to \_\_\_\_\_. A person knows a fact if the person believes that the fact exists.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.365.

The alternative form of the second element is to be used when the relationship alleged is that of uncle-niece or aunt-nephew. Defendant might be any one of these four. It is unnecessary to define the terms

“child,” “grandchild,” “parent,” “grandparent,” “brother,” or “sister,” but the terms “uncle” and “aunt” are popularly used so loosely that it seems advisable to provide specifically for that relationship.

The use in the statute of the term “sexual intercourse” seems to restrict the crime of incest to the act of male-female genital intercourse. See M.S.A. § 609.341, subd. 12.

In *State v. Wilson*, 524 N.W.2d 271 (Minn. App. 1994), the Court of Appeals rejected the claim that M.S.A. § 609.365 was unconstitutionally vague. The Court held that the prohibition of sexual intercourse with another nearer of kin to the actor than first cousin computed by the civil law, while “somewhat complicated,” was not unconstitutionally vague. The Court held that sexual relations with the daughter of a half sister constitutes the crime of incest.



**CRIMJIG 12.95**

**BIGAMY—DEFINED**

The statutes of Minnesota provide that whoever

- [1] marries in Minnesota with knowledge that (his) (her) prior marriage is not dissolved,
- [2] marries in Minnesota with knowledge that the prior marriage of the person (he) (she) marries is not dissolved,
- [3] lives together in Minnesota under the representation or appearance of being married with a person whom (he) (she) married outside Minnesota with knowledge either that (his) (her) own prior marriage or the prior marriage of the other person has not been dissolved,

is guilty of a crime

\_\_\_\_\_

COMMENT

M.S.A. § 609.355.

**CRIMJIG 12.96****BIGAMY—ELEMENTS**

The elements of bigamy are:

First, the defendant (married \_\_\_\_\_ in Minnesota) (lived with \_\_\_\_\_ in Minnesota under the representation or appearance of being married, having been married in another state).

Second, (the defendant) (\_\_\_\_\_) had entered into a previous marriage.

Third, the defendant at the time of the marriage to \_\_\_\_\_ knew that (his) (her) (\_\_\_\_\_'s) marriage had not been dissolved. (Even if the marriage had not been dissolved, the defendant did not know this (if the defendant reasonably believed in good faith that the marriage had been dissolved) (if the defendant did not know of the marriage at all).)

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.355.

The Criminal Code Advisory Committee Comment to M.S.A. § 609.355 makes it clear that a good faith belief in the validity of a prior divorce or dissolution is a defense, and also that it is unnecessary to prove sexual intercourse in order to establish cohabitation.

Technically, one cannot "marry" while a prior marriage is undissolved, since the marriage is void, M.S.A. § 518.01, but it seems clearer to use the term "marry" in instructing the jury, rather than the more cumbersome "go through the form of marriage" or a similar phrase.

**CRIMJIG 12.97**

**BESTIALITY—DEFINED**

The statutes of Minnesota provide that whoever carnally knows (a dead body) (an animal) (a bird) is guilty of a crime.

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COMMENT

M.S.A. § 609.294.



**CRIMJIG 12.98****BESTIALITY—ELEMENTS**

The elements of bestiality are:

First, the defendant carnally knew \_\_\_\_\_ (a dead body) (an animal) (a bird). "To carnally know" means that defendant engaged in sexual penetration with \_\_\_\_\_.

Second, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty of bestiality, you have an additional issue to determine, and it will be put to you in the form of a question that will appear on the verdict form. The question is: Was the defendant's act knowingly done in the presence of another person? You will answer this question "yes" or "no." If you have a reasonable doubt as to the answer, you will answer the question "no."

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**COMMENT**

M.S.A. § 609.294.

"In its generally accepted meaning 'carnal knowledge' signifies sexual intercourse. Sodomy involves abnormal and perverted sexual relationship. Both carnal knowledge and sodomy involve carnal knowledge of the victim." *State v. Schwartz*, 215 Minn. 476, 10 N.W.2d 370 (1943). This use of the term "carnal knowledge" seems equivalent to the meaning of "sexual penetration," as defined in M.S.A. § 609.341, subd. 12.

In *State v. Bonyng*, 450 N.W.2d 331 (Minn. App. 1990), the Court of Appeals interpreted the term "carnally knows" in context of the bestiality statute. The Court of Appeals held that acts of masturbation of a dog and oral and vaginal intercourse with a dog constituted carnal knowledge within the meaning of M.S.A. § 609.294.

**CRIMJIG 12.99****FAILURE TO REGISTER AS A PREDATORY  
OFFENDER—DEFINED**

The statutes of Minnesota provide that a person required to register as a predatory offender who

[1] knowingly violates any of the requirements to register

[or]

[2] intentionally provides false information to (a corrections agent) (a law enforcement authority) (the bureau of criminal apprehension)

is guilty of a crime.

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**COMMENT**

M.S.A. § 243.166, subd. 5.

Registration laws have withstood constitutional challenges as violating the Ex Post Facto Clause at both the state (*State v. Manning*, 532 N.W.2d 244 (Minn. App. 1995)) and federal (*Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L.Ed.2d 164 (2003)) levels. They have also withstood procedural due process challenges, again at the state (*Boutin v. LaFleur*, 591 N.W.2d 711 (Minn.1999)) and federal (*Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 7, 123 S. Ct. 1160, 155 L.Ed.2d 98 (2003)) levels.

A person need not be convicted of, or adjudicated delinquent for, one of the enumerated offenses to trigger mandatory predatory sex offender registration; rather, a person that is initially charged with or is the subject of a petition for an enumerated offense, must only be convicted of or adjudicated delinquent for another offense which arose out of the same set of circumstances as the charged predatory offense. *In re Welfare of J.R.Z.*, 648 N.W.2d 241 (Minn. App. 2002). Registration as a sex offender is required when a person is convicted of offenses not listed in sex offender registration statute if the person was charged with an enumerated offense and the offenses arose out of the same set of circumstances. *Kaiser v. State*, 641 N.W.2d 900 (Minn. 2002). Registration is also required of persons “convicted of or adjudicated delinquent in another state for an offense” that would constitute a violation of the registerable criminal offenses specified in Minnesota’s registration law. See M.S.A. sec. 243.166, subd.1(b)(1).

Defendant, who was charged with third-degree criminal sexual conduct, but who pleaded guilty to assault, was required to register under predatory offender registration statute, where the charge was for a predatory offense and the offense for which he was convicted arose out of the same set of circumstances involving his girlfriend. *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999); *cert. denied*, 528 U.S. 973, 120 S. Ct. 417, 145 L.Ed.2d 326 (1999).



**CRIMJIG 12.100****FAILURE TO REGISTER AS A PREDATORY  
OFFENDER—CONVICTED OR ADJUDICATED  
DELINQUENT—ELEMENTS**

The elements of failure to register as a predatory offender are:

[First, defendant is a person required to register as a predatory offender. ["A person required to register as a predatory offender" includes a person who has ((been charged with and convicted of))(attempting to commit)(aiding another to commit) (conspiracy to commit) the offense of \_\_\_\_\_<sup>1</sup>) (or another offense arising out of the same set of circumstances).]

[First, the defendant is a person required to register as a predatory offender. ["A person required to register as a predatory offender" includes a person who has (been petitioned and adjudicated delinquent for)(attempting to commit)(aiding another to commit) (conspiracy to commit) the offense of \_\_\_\_\_<sup>2</sup> (or another offense arising out of the same set of circumstances).]

[1] Second, the defendant knowingly violated any of the requirements to register. The requirements to register include \_\_\_\_\_.<sup>3</sup>

[2] Second, the defendant intentionally provided false information to (a corrections agent) (a law enforcement authority) (the bureau of criminal apprehension).

Third, the time period during which defendant is required to register has not elapsed.

**12.100**

<sup>1</sup>The offenses listed in M.S.A. § 243.166, subd. 1b.

<sup>2</sup>The offenses listed in M.S.A. § 243.166, subd. 1b.

<sup>3</sup>See M.S.A. § 243.166 for re-

quirements. This includes not only the content requirements under subdivisions 4, 4a, and 4b but also the registration procedures under subdivisions 3 and 3a, and the time requirement under subdivisions 1 and 6.

Fourth, the defendant's (act) (failure to act) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 243.166, subd. 1(b).

In *State v. Iverson*, 664 N.W.2d 346 (Minn. 2003), the Supreme Court held that, in the case of a homeless defendant, a factual inquiry into the defendant's living situation is required to determine whether the defendant lives somewhere where mail can be received and can provide five days' notice that the defendant will be going there. If the defendant's "living location" does not fit these criteria, the defendant cannot be found guilty of failure to provide the five days' notice required by M.S. A. § 243.166, subd. 3(b). See M.S.A. § 243.166, subd. 3a for registration requirement when a person lacks a primary address.

The Court of Appeals, in *State v. Wemyss*, 696 N.W.2d 802 (Minn. App. 2005) held that a defendant charged with failing to register as a predatory offender has a right to stipulate to the prior convictions creating a duty for him to register. Evidence tending to show that a defendant has knowledge of his duty to register is admissible if it does not undermine any stipulation to the prior convictions. However, the Court noted that "[a] defendant may not be allowed to unilaterally control the need for relevant evidence by offering to stipulate, especially where the evidence bears upon other issues not covered by the stipulation."

**CRIMJIG 12.101****FAILURE TO REGISTER AS A PREDATORY  
OFFENDER—CONVICTED OR ADJUDICATED  
DELINQUENT UNDER FEDERAL LAW OR LAW OF  
ANOTHER STATE—ELEMENTS**

The elements of failure to register as a predatory offender are

First, defendant is a person required to register as a predatory offender. ["A person who is required to register as a predatory offender" includes a person who has (been convicted of) (adjudicated delinquent for) (violating a federal law) (an offense in another state) (an offense in a court martial) that would be a violation of \_\_\_\_\_<sup>1</sup> (or another offense arising out of the same set of circumstances) if committed in Minnesota.

Second, the defendant has entered the state to (reside) (work) (attend school).<sup>2</sup>

[1] Third, the defendant knowingly violated any of the requirements to register. The requirements to register include \_\_\_\_\_.<sup>3</sup>

[2] Third, the defendant intentionally provided false information to (a corrections agent) (a law enforcement authority) (the bureau of criminal apprehension)

Fourth, the time period during which defendant is required to register has not elapsed.

Fifth, the defendant's (act) (failure to act) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

**12.101**

<sup>1</sup>An offense listed in M.S.A. § 243.166, subd. 1

<sup>2</sup>For definition of these terms, see M.S.A. § 243.166, subd. 1(b)(3).

<sup>3</sup>See M.S.A. § 243.166 for re-

quirements. This includes not only the content requirements under subdivisions 4 and 4a, but also the registration procedures under subdivision 3 and the time requirement under subdivisions 1 and 6.



**If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.**

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**COMMENT**

M.S.A. § 243.166, subd. 1(b).

**CRIMJIG 12.102****FAILURE TO REGISTER AS A PREDATORY  
OFFENDER—COMMITTED PURSUANT TO COURT  
ORDER—ELEMENTS**

The elements of failure to register as a predatory offender are

First, defendant is a person required to register as a predatory offender. ["A person is required to register as a predatory offender" includes a person who has been committed pursuant to a court commitment order [pursuant to Minnesota Statutes 253B.185] [as a person with a sexual psychopathic personality] [as a sexually dangerous person] [under a law of another state or the United States similar to Minnesota law]].

[1] Second, the defendant knowingly violated any of the requirements to register. The requirements to register include \_\_\_\_\_.<sup>1</sup>

[2] Second, the defendant intentionally provided false information to (a corrections agent) (a law enforcement authority) (the bureau of criminal apprehension).

Third, the time period during which defendant is required to register has not elapsed.

Fourth, the defendant's (act) (failure to act) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**12.102**

<sup>1</sup>See M.S.A. § 243.166 for requirements. This includes not only the content requirements under subdivi-

sions 4 and 4a, but also the registration procedures under subdivision 3 and the time requirement under subdivisions 1 and 6.

**COMMENT**

M.S.A. § 243.166, subd. 1(c).



**CRIMJIG 12.103****FAILURE TO REGISTER AS A PREDATORY  
OFFENDER—MENTAL COMMITMENT AFTER  
TRIAL—ELEMENTS**

The elements of failure to register as a predatory offender are

First, defendant is a person required to register as a predatory offender. To determine whether a person is required to register as a predatory offender you must first determine that (he) (she) was:

1) charged with (attempting to commit)) (petitioned for (attempting to commit)) the offense of \_\_\_\_\_<sup>1</sup> (or a similar offense under (federal law) (the law of another state) (You are directed that \_\_\_\_\_ is such an offense); and

2) found (not guilty by reason of (mental illness) (mental deficiency) after a trial for that offense) (guilty but mentally ill after a trial for that offense); and

3) committed pursuant to a court commitment order [pursuant to Minnesota Statutes 253B.185] [as a person with a sexual psychopathic personality] [as a sexually dangerous person] [under a law of another state or the United States similar to Minnesota law. You are directed that \_\_\_\_\_ is such a law.]

[1] Second, the defendant knowingly violated any of the requirements to register. The requirements to register include \_\_\_\_\_.<sup>2</sup>

[2] Second, the defendant intentionally provided false information to (a corrections agent) (a law enforcement authority) (the bureau of criminal apprehension)

**12.103**

<sup>1</sup>The offenses listed in M.S.A. § 243.166, subd. 1.

<sup>2</sup>See M.S.A. § 243.166 for requirements. This includes not only the

content requirements under subdivisions 4 and 4a, but also the registration procedures under subdivision 3 and the time requirement under subdivisions 1 and 6.

Third, the time period during which defendant is required to register has not elapsed.

Fourth, the defendant's (act) (failure to act) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 243.166, subd. 1(d).

## CRIMJIG 12.104

### DISSEMINATION OF PORNOGRAPHIC WORK INVOLVING MINORS—DEFINED

Under Minnesota law, whoever, knowing or having reason to know its contents and character, knowingly disseminates [for profit] a pornographic work involving the use of minors to an adult or a minor is guilty of a crime.

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#### COMMENT

M.S.A. § 617.246, subd. 4 (for profit).

M.S.A. § 617.247, subd. 3.



**CRIMJIG 12.105****DISSEMINATION OF PORNOGRAPHIC WORK  
INVOLVING MINORS—ELEMENTS**

The elements of dissemination of a pornographic work are:

First, defendant knowingly disseminated a pornographic work (to an adult or minor).

Second, the pornographic work involved the use of a minor. "Minor" means any person under the age of 18 at the time the work was (created) (or) (altered).

Third, the defendant knew or had reason to know that the content and character of the work was pornographic work involving the use of minors.

"Pornographic work" means:

- [1] an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor;
- [2] any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical or other means that:
  - (i) uses a minor to depict actual or simulated sexual conduct;
  - (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct (An identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.);
  - (iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

"Sexual performance" means any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that depicts sexual conduct.

"Sexual conduct" means any of the following:

- [1] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.
- [2] Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.
- [3] Masturbation;
- [4] Lewd exhibitions of the genitals.
- [5] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

[Consent to the sexual performance by the minor or the minor's (parent) (guardian) (custodian) is not a defense to this charge.]

[Mistake by the defendant as to the minor's age is not a defense to this charge.]

[Fourth, the defendant disseminated the work for profit.]

[Fourth] [Fifth], the defendant's acts took place on or about \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

The definition of “had reason to know” is derived from *State v. Mauer*, 741 N.W.2d 107 (Minn. 2007), in which the Supreme Court, in identifying the lowest constitutional standard of behavior sufficient to meet the scienter requirement for a felony offense, adopted a recklessness standard. The numerated list is the Committee’s attempt to provide a clear explanation of the standard in terms a jury can understand. The Committee relied not only *Mauer*, but also upon *State v. Engle*, 743 N.W.2d 592 (Minn. 2008), a reckless discharge of a firearm case decided after *Mauer*, in formulating the list. The Supreme Court used the same phrase, “in conscious disregard of a substantial and unjustifiable risk,” to define both “had reason to know” and “reckless.”



**CRIMJIG 12.106**

**POSSESSION OF PORNOGRAPHIC WORK  
INVOLVING MINORS—DEFINED**

Under Minnesota law, whoever, knowing or having reason to know its contents and character, possesses

- [1] a pornographic work
- [2] a computer disk or computer or other electronic, magnetic or optical storage system or a storage system of any other type containing a pornographic work

involving minors is guilty of a crime.

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COMMENT

M.S.A. 617.247, subd. 4,

**CRIMJIG 12.107****POSSESSION OF PORNOGRAPHIC WORK  
INVOLVING MINORS—ELEMENTS**

**The elements of possession of a pornographic work are:**

**First, defendant possessed a (pornographic work) (or) (a computer disk or computer or other electronic, magnetic or optical storage system or a storage system of any other type containing a pornographic work).**

**Second, the defendant knew or had reason to know that the content and character of the work was pornographic work involving minors. "To know" requires only that the actor believes that the specified fact exists. "Had reason to know" means that the defendant acted in conscious disregard of a substantial and unjustifiable risk that the work was a pornographic work involving minors. "In conscious disregard of a substantial and unjustifiable risk" means that the defendant was aware 1) there was a risk that the work was a pornographic work involving minors; 2) the risk was substantial; 3) there was no adequate reason for taking the risk; and the defendant disregarded the risk.**

**"Minor" means any person under the age of 18 at the time the pornographic work was (created) (or) (altered).**

**"Pornographic work" means:**

- [1] an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor;**
- [2] any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical or other means that:**
  - (i) uses a minor to depict actual or simulated sexual conduct;**
  - (ii) has been created, adapted, or modified to appear**

that an identifiable minor is engaging in sexual conduct (An identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.);

(iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

"Sexual performance" means any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that depicts sexual conduct.

"Sexual conduct" means any of the following:

- [1] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.
- [2] Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.
- [3] Masturbation;
- [4] Lewd exhibitions of the genitals.
- [5] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

[Consent to the sexual performance by the minor or (parent) (guardian) (custodian) is not a defense to this charge.]



Third, the defendant's acts took place on or about \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

The definition of "had reason to know" is derived from *State v. Mauer*, 741 N.W.2d 107 (Minn. 2007), in which the Supreme Court, in identifying the lowest constitutional standard of behavior sufficient to meet the scienter requirement for a felony offense, adopted a recklessness standard. The numerated list is the Committee's attempt to provide a clear explanation of the standard in terms a jury can understand. The Committee relied not only *Mauer*, but also upon *State v. Engle*, 743 N.W.2d 592 (Minn. 2008), a reckless discharge of a firearm case decided after *Mauer*, in formulating the list. The Supreme Court used the same phrase, "in conscious disregard of a substantial and unjustifiable risk," to define both "had reason to know" and "reckless."

**CRIMJIG 12.108**

**CRIMINAL SEXUAL PREDATORY CONDUCT—  
DEFINED**

Under Minnesota law, whoever commits a predatory crime  
that was

[1] motivated by the (his) (her) sexual impulses

(or)

[2] part of a predatory pattern of behavior that had criminal sexual conduct as its goal

is guilty of a crime.

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COMMENT

M.S.A. § 609.3453, subd. 1. See M.S.A. 609.341, subd. 22 for definition of “predatory crime.”

*See the Comment to CRIMJIG 11.15 for cases on establishing a pattern of behavior.*

**CRIMJIG 12.109**

**CRIMINAL SEXUAL PREDATORY CONDUCT—  
ELEMENTS**

The defendant has been (charged with) (indicted for) the crime of \_\_\_\_\_.<sup>1</sup> You are instructed that \_\_\_\_ is a predatory offense.

The elements of \_\_\_\_ are:

[Insert elements from appropriate JIG.]

[Insert the following additional element(s) as appropriate:

\_\_\_\_, the defendant was motivated to commit this crime by defendant's sexual impulses.

\_\_\_\_, the defendant's behavior was part of a predatory pattern of behavior that had criminal sexual conduct as its goal.

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**12.109**

<sup>1</sup>The predatory offense as listed

in M.S.A. § 609.341, sub.22. See M.S.A. 609.3453.



**CRIMJIG 12.110****ADDITIONAL FINDINGS—HEINOUS ELEMENTS<sup>1</sup>**

If you find the defendant guilty, you have (an) additional issue(s) to determine and (it) (they) will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (is) (are):

[Did the defendant torture the victim? "Torture" means the intentional infliction of extreme mental anguish, or extreme psychological or physical abuse, when committed in an especially depraved manner.]

[Did the defendant intentionally inflict great bodily harm upon the defendant? "Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.]

[Did the defendant intentionally mutilate the victim? "Mutilation" means the intentional infliction of physical abuse designed to cause serious permanent disfigurement or permanent or protracted loss of the functions of any bodily member or organ where the defendant relishes the infliction of the abuse, evidencing debasement or perversion.]

[Did the defendant expose the victim to extreme inhumane conditions? "Extreme inhumane conditions" means situations where either before or after the (sexual penetration) (sexual contact) the defendant knowingly causes or permits the victim to be placed in a situation likely to cause the

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**12.110**

<sup>1</sup>A factfinder may not consider a heinous element if it is an element of the underlying offense. In addition, when determining whether two or

more heinous elements exist, the factfinder may not use the same underlying facts to support a determination that more than one element exists. M.S.A. § 609.3455, subd. 2(b).

victim severe ongoing mental, emotional, or psychological harm or causes the victim's death.]

[Was the defendant armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon and defendant used or threatened to use the weapon or article to cause the victim to submit?]

[Did the defendant engage in (sexual penetration) (sexual contact) with more than one victim in this incident?]

[Did more than one defendant engage in (sexual penetration) (sexual contact) with the victim in this incident?]

[Did the defendant, without the victim's consent, remove the victim from one place to another and did not release the victim in a safe place?]

[Other aggravating factor questions]<sup>2</sup>

You should answer the question(s) "yes" or "no." If you have reasonable doubt as to the answer to (the) (any) question, you should answer the question "no."

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#### COMMENT

M.S.A. 609.3455, subd. 1 and subd. 2.

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<sup>2</sup>See 10 Criminal Jury Instruction Guides, Chapter 8, Appendix A, for list of other aggravating factors.

**CRIMJIG 12.111****AFFIRMATIVE DEFENSE TO CHARGE OF  
PROSTITUTION CRIME**

Defendant asserts a defense to the charge of prostitution.

It is an affirmative defense to (Insert appropriate name of charge under M.S.A. § 609.324) if the defendant proves by a preponderance of the evidence that the defendant is a (labor trafficking victim) (or) (a sex trafficking victim) and that the defendant committed the act only under compulsion by another who by explicit or implicit threats created a reasonable apprehension in the mind of the defendant that if the defendant did not commit the act, the person would inflict bodily harm upon the defendant. ["Labor trafficking victim means a person subjected to the recruitment, transportation, transfer, harboring, enticement, provision, obtaining, or receipt of a person by any means, whether a United States citizen or foreign national, for the purpose of: (1) debt bondage or forced labor or services;(2) slavery or practices similar to slavery; or (3) the removal of organs through the use of coercion or intimidation."] ["Sex trafficking victim" means a person subjected to the practices of receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual.]

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**COMMENT**

M.S.A. § 609.325, subd. 4.



**CRIMJIG 12.112**

**CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—CORRECTIONAL FACILITY EMPLOYEE  
MISCONDUCT—DEFINED**

Under Minnesota law, whoever is an [employee,] [independent contractor,] [volunteer] of a state, county, city, or privately operated adult or juvenile correctional system and intentionally engages in sexual penetration with

[1] a resident of a facility

[2] a person under supervision of the correctional system

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.344, subd 1(m).

**CRIMJIG 12.113****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—CORRECTIONAL FACILITY EMPLOYEE  
MISCONDUCT—ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated

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- [1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.
- [2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.
- [3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.
- [4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.
- [5] Any intrusion however slight, into the genital or anal openings of \_\_\_\_'s body by (any part of the defendant's body) or (any object used by the defendant for this purpose).
- [6] Any intrusion however slight into the genital or anal openings of \_\_\_\_'s body by any part of \_\_\_\_'s body by any part of the body of another person or by any object used by \_\_\_\_ or by another person for this purpose and the intrusion was effected by the defendant and the defendant was in a position of authority

or used coercion<sup>1</sup> (or by inducement if \_\_\_\_ was mentally impaired). [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] ["Mentally impaired" means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

- [7] Any intrusion however slight by any part of the body of the defendant or another person by any part of the body of \_\_\_\_ or by any object used by \_\_\_\_ for this purpose, and the intrusion was effected by the defendant and the defendant was in a position of authority or used coercion<sup>1</sup> (or by inducement if \_\_\_\_ was mentally impaired). [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] ["Mentally impaired" means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, at the time of the sexual penetration, the defendant was a [employee] [independent contractor] [volunteer] of a [state] [county] [city] [privately operated] [adult] [juvenile] correctional system.

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12.113

tions of "force" and "coercion."

<sup>1</sup>See CRIMJIG 12.01 for defini-



Third, at the time of the sexual penetration, \_\_\_\_\_ (the complainant) was [a resident of a facility] [under the supervision] of the correctional system. Consent is not a defense to this charge.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

The statutory definition of "position of authority" does not contain an exclusive list of persons in a position of authority. *State v. Larson*, 520 N.W.2d 456 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994).

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of Appeals was asked to resolve a question on the meaning of "position of authority." In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a "position of authority." The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the "position of authority" language of the statute is "broadly defined."

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn. App. 2006), held, against a vagueness challenge, that the statutory definition of "position of authority" included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work premises.

**CRIMJIG 12.114**

**CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—CORRECTIONAL FACILITY EMPLOYEE  
MISCONDUCT—DEFINED**

Under Minnesota law, whoever is an [employee] [independent contractor] [volunteer] of a state, county, city, or privately operated adult or juvenile correctional system and intentionally engages in sexual contact with

[1] a resident of a facility

[2] a person under supervision of the correctional system  
is guilty of a crime.

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**COMMENT**

M.S.A. § 609.345(m).

**CRIMJIG 12.115****CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE—CORRECTIONAL FACILITY EMPLOYEE MISCONDUCT—ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

[1] First, the defendant intentionally touched \_\_\_\_'s intimate parts or the clothing covering the immediate area of \_\_\_\_'s intimate parts. [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

[2] First, the defendant intentionally effected the touching by the complainant of the defendant's, \_\_\_\_'s, or another's intimate parts or the clothing covering the immediate area of the intimate parts and the defendant was in a position of authority or used coercion<sup>1</sup> (or by inducement and \_\_\_\_ is under 13 years of age or mentally impaired). [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.] ["Mentally impaired" means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

[3] First, defendant intentionally effected the touching of \_\_\_\_'s intimate parts or the clothing covering the immediate area of \_\_\_\_'s intimate parts by another and the defendant was in a position of authority or used coercion<sup>1</sup> to accomplish the act. [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent,

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12.115

tions of "force" and "coercion."

<sup>1</sup>See CRIMJIG 12.01 for defini-



or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [The “intimate parts” of the body include the genital area, groin, inner thigh, buttocks, and breast.]

Second, at the time of the sexual contact, the defendant was a [employee] [independent contractor] [volunteer] of a [state] [county] [city] [privately operated] [adult] [juvenile] correctional system.

Third, at the time of the sexual contact, \_\_\_\_\_ (the complainant) was [a resident of a facility] [under the supervision] of the correctional system. Consent of \_\_\_\_\_ (the complainant) is not a defense to this charge.

Fourth, the defendant acted with sexual or aggressive intent.

Fifth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

The statutory definition of “position of authority” does not contain an exclusive list of persons in a position of authority. *State v. Larson*, 520 N.W.2d 456 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994).

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of Appeals was asked to resolve a question on the meaning of “position of authority.” In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a “position of authority.” The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the “position of authority” language of the statute is “broadly defined.”

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn.

App. 2006), held, against a vagueness challenge, that the statutory definition of “position of authority” included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work premises.

**CRIMJIG 12.116**

**CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—SPECIAL TRANSPORTATION  
EMPLOYEE MISCONDUCT—DEFINED**

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Under Minnesota law, whoever provides or is an agent of someone who provides special transportation service and intentionally engages in sexual penetration with a person who used the special transportation service is guilty of a crime.

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**COMMENT**

Minn. Stat. § 609.344, subd 1(n).



**CRIMJIG 12.117****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—SPECIAL TRANSPORTATION  
EMPLOYEE MISCONDUCT—ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated.

- [1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.
- [2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.
- [3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.
- [4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.
- [5] Any intrusion however slight, into the genital or anal openings of \_\_\_\_'s body by (any part of the defendant's body) or (any object used by the defendant for this purpose).
- [6] Any intrusion however slight into the genital or anal openings of \_\_\_\_'s body by any part of \_\_\_\_'s body by any part of the body of another person or by any object used by \_\_\_\_ or by another person for this purpose and the intrusion was effected by the defendant and the defendant was in a position of authority

or used coercion<sup>1</sup> (or by inducement if \_\_\_\_ was mentally impaired). [A “position of authority” includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [“Mentally impaired” means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

- [7] Any intrusion however slight by any part of the body of the defendant or another person by any part of the body of \_\_\_\_ or by any object used by \_\_\_\_ for this purpose, and the intrusion was effected by the defendant and the defendant was in a position of authority or used coercion<sup>1</sup> (or by inducement if \_\_\_\_ was mentally impaired). [A “position of authority” includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [“Mentally impaired” means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, at the time of the sexual penetration, the defendant was a provider or an agent of someone who provides special transportation service

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12.117

tions of “force” and “coercion.”

<sup>1</sup>See CRIMJIG 12.01 for defini-



Third, at the time of the sexual penetration, \_\_\_\_ (the complainant) was person who used the special transportation service. Consent of \_\_\_\_\_ (the complainant) is not a defense to this charge.

Fourth, the sexual penetration occurred during or immediately before or after the defendant transported the complainant.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

The statutory definition of "position of authority" does not contain an exclusive list of persons in a position of authority. *State v. Larson*, 520 N.W.2d 456 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994).

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of Appeals was asked to resolve a question on the meaning of "position of authority." In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a "position of authority." The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the "position of authority" language of the statute is "broadly defined."

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn. App. 2006), held, against a vagueness challenge, that the statutory definition of "position of authority" included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work



premises.

## CRIMJIG 12.118

### CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE—SPECIAL TRANSPORTATION EMPLOYEE MISCONDUCT—DEFINED

Under Minnesota law, whoever provides or is an agent of someone who provides special transportation service and intentionally engages in sexual contact with a person who used the special transportation service is guilty of a crime.

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#### COMMENT

Minn. Stat. § 609.345, subd 1(n).

**CRIMJIG 12.119****CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—SPECIAL TRANSPORTATION  
EMPLOYEE MISCONDUCT—ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

[1] First, the defendant intentionally touched \_\_\_\_'s intimate parts or the clothing covering the immediate area of \_\_\_\_'s intimate parts. [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

[2] First, the defendant intentionally effected the touching by the complainant of the defendant's, \_\_\_\_'s, or another's intimate parts or the clothing covering the immediate area of the intimate parts and the defendant was in a position of authority or used coercion<sup>1</sup> (or by inducement and \_\_\_\_ is under 13 years of age or mentally impaired). [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.] ["Mentally impaired" means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

[3] First, defendant intentionally effected the touching of \_\_\_\_'s intimate parts or the clothing covering the immediate area of \_\_\_\_'s intimate parts by another and the defendant was in a position of authority or used coercion<sup>1</sup> to accomplish the act. [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent,

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12.119

tions of "force" and "coercion."

<sup>1</sup>See CRIMJIG 12.01 for defini-



or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

Second, at the time of the sexual contact, the defendant [provided special transportation service] [was an agent of special transportation service].

Third, \_\_\_\_ (the complainant) used the special transportation service. Consent of \_\_\_\_\_ (the complainant) is not a defense to this charge.

Fourth, the sexual contact occurred during or immediately before or after the defendant transported \_\_\_\_ (the complainant).

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 12.120**

**CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—MASSAGE OR OTHER BODYWORK—  
DEFINED**

Under Minnesota law, whoever performs massage or other bodywork for hire and intentionally engages in non-consensual sexual penetration with a person who was a user of those services is guilty of a crime.

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**COMMENT**

Minn. Stat. § 609.344, subd 1(o).

**CRIMJIG 12.121****CRIMINAL SEXUAL CONDUCT IN THE THIRD  
DEGREE—MASSAGE OR OTHER BODYWORK—  
ELEMENTS**

The elements of criminal sexual conduct in the third degree are:

First, the defendant intentionally sexually penetrated

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- [1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.
- [2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.
- [3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.
- [4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.
- [5] Any intrusion however slight, into the genital or anal openings of \_\_\_\_'s body by (any part of the defendant's body) or (any object used by the defendant for this purpose).
- [6] Any intrusion however slight into the genital or anal openings of \_\_\_\_'s body by any part of \_\_\_\_'s body by any part of the body of another person or by any object used by \_\_\_\_ or by another person for this purpose and the intrusion was effected by the defendant and the defendant was in a position of authority



or used coercion<sup>1</sup> (or by inducement if \_\_\_\_\_ was mentally impaired). [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] ["Mentally impaired" means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

- [7] Any intrusion however slight by any part of the body of the defendant or another person by any part of the body of \_\_\_\_\_ or by any object used by \_\_\_\_\_ for this purpose, and the intrusion was effected by the defendant and the defendant was in a position of authority or used coercion<sup>1</sup> (or by inducement if \_\_\_\_\_ was mentally impaired). [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] ["Mentally impaired" means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

[Emission of semen is not necessary to accomplish sexual penetration.]

Second, at the time of the sexual penetration, the defendant was performing a massage or other bodywork.

Third, the defendant was performing for hire.

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12.121

tions of "force" and "coercion."

<sup>1</sup>See CRIMJIG 12.01 for defini-

Fourth, at the time of the sexual penetration, \_\_\_\_ (the complainant) was a person who used those services.

Fifth, the sexual penetration occurred during or immediately before or after the defendant performed the massage or other bodywork.

Sixth, \_\_\_\_\_ (the complainant) did not consent to sexual penetration.

Seventh, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 12.122**

**CRIMINAL SEXUAL CONDUCT IN THE FOURTH  
DEGREE—MASSAGE OR OTHER BODYWORK—  
DEFINED**

Under Minnesota law, whoever provides performs mas-  
sage or other bodywork and intentionally engages in sexual  
contact with a person who was a user of those services is guilty  
of a crime.

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**COMMENT**

Minn. Stat. § 609.345, subd 1(o).



**CRIMJIG 12.123****CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE—MASSAGE OR OTHER BODYWORK—ELEMENTS**

The elements of criminal sexual conduct in the fourth degree are:

[1] First, the defendant intentionally touched \_\_\_\_'s intimate parts or the clothing covering the immediate area of \_\_\_\_'s intimate parts. [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

[2] First, the defendant intentionally effected the touching by the complainant of the defendant's, \_\_\_\_'s, or another's intimate parts or the clothing covering the immediate area of the intimate parts and the defendant was in a position of authority or used coercion<sup>1</sup> (or by inducement and \_\_\_\_ is under 13 years of age or mentally impaired). [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent, or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.] ["Mentally impaired" means that a person as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact.]

[3] First, defendant intentionally effected the touching of \_\_\_\_'s intimate parts or the clothing covering the immediate area of \_\_\_\_'s intimate parts by another and the defendant was in a position of authority or used coercion<sup>1</sup> to accomplish the act. [A "position of authority" includes, but is not limited to, any person who is a parent, is acting in the place of a parent, or is charged with any rights, duties, or responsibilities of a parent,

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12.123

tions of "force" and "coercion."

<sup>1</sup>See CRIMJIG 12.01 for defini-

or who is charged, no matter how briefly, with any duty or responsibility for the health, welfare, or supervision of a child.] [The "intimate parts" of the body include the genital area, groin, inner thigh, buttocks, and breast.]

Second, at the time of the sexual contact, the defendant was performing a massage or other bodywork.

Third, the defendant was performing for hire.

Fourth, at the time of the sexual contact, \_\_\_\_\_ (the complainant) was a person who used those services.

Fifth, the sexual contact occurred during or immediately before or after the defendant performed the massage or other bodywork.

Sixth, \_\_\_\_\_ (the complainant) did not consent to the sexual contact.

Seventh, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 12.124****ELECTRONIC SOLICITATION OF A CHILD TO  
ENGAGE IN SEXUAL CONDUCT—DEFINED**

The statutes of Minnesota provide that whoever is eighteen years of age or older and who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission with the intent to arouse the sexual desire of any person

- [1] solicits a child 15 years of age or younger or someone the person reasonably believes is a child to engage in sexual conduct
- [2] engages in communication with a child 15 years of age or younger or someone the person reasonably believes is a child, relating to or describing sexual conduct
- [3] distributes any material, language, or communication, including a photographic or video image, that relates to or describes sexual conduct to a child 15 years of age or younger or someone the person reasonably believes is a child

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.352, subd. 2a



**CRIMJIG 12.125**

**ELECTRONIC SOLICITATION OF A CHILD TO  
ENGAGE IN SEXUAL CONDUCT—ELEMENTS**

The elements of solicitation of a child to engage in sexual conduct are:

First, the defendant was eighteen years of age or older.

Second, \_\_\_\_\_ was fifteen years of age or younger or the defendant reasonably believed \_\_\_\_\_ to be fifteen years of age or younger. Mistake as to (\_\_\_\_\_'s) (the victim's) age is not a defense.

[1] Third, the defendant used (the Internet) (a computer) (computer program) (computer network) (computer system) (an electronic communications system) (a telecommunications, wire, or radio communications system) (or) (another electronic device capable of electronic data storage or transmission).

Fourth, the defendant did so to solicit (\_\_\_\_\_) to engage in sexual conduct.

[2] Third, the defendant used (the Internet) (a computer) (computer program) (computer network) (computer system) (an electronic communications system) (a telecommunications, wire, or radio communications system) (or) (another electronic device capable of electronic data storage or transmission).

Fourth, the defendant did so to engage in communication with (\_\_\_\_\_) relating to or describing sexual conduct.

[3] Third, the defendant used (the Internet) (a computer) (computer program) (computer network) (computer system) (an electronic communications system) (a telecommunications, wire, or radio communications system) (or) (another electronic device capable of electronic data storage or transmission).

Fourth, the defendant did so to distribute any material language, or communication, including a photographic or video image, that relates to or describes sexual conduct to (\_\_\_\_\_).

**"Sexual conduct" means:**

[1] Sexual contact with the individual's primary genital area.

[2] Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, into the genital or anal openings of the child's body or any part of the defendant's body with any object used by the defendant for this purpose. [Emission of semen is not necessary to accomplish this element.]

[3] Performance in any play, dance, or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that depicts any of the following:

[A] An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

[B] Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

[C] Masturbation or lewd exhibitions of the genitals.

[D] Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

Fifth, the defendant acted with intent to arouse the sexual desire of \_\_\_\_\_ (the victim).

Sixth, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

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COMMENT

In *State v. Coonrod*, 652 N.W.2d 715 (Minn. App. 2002), a case involving a "sting" conducted by a postal inspector working with Internet Crimes Against Children Task Force, the Court of Appeals found that the statutory requirement that defendant solicit a "specific person" for purposes of the child solicitation statute does not require solicitation of an actual person. A fictional persona created by electronic means was sufficiently a "specific person, as distinguished from an 'actual person,' " to support a prosecution for soliciting.



## CHAPTER 13

# ASSAULT AND RELATED CRIMES AGAINST THE PERSON

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## CRIMJIG 13.01

### ASSAULT—INTENT TO CAUSE FEAR

[See CRIMJIG 13.30 for an example of an instruction on Assault—Intent to Cause Fear]

The term “assault” as used in this (case) (charge) means an act done with intent to cause \_\_\_\_ (the victim) to fear immediate bodily harm or death.

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

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#### COMMENT

M.S.A. § 609.02, subd. 10(1).

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#### 13.01

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.

In cases in which a defendant is charged with a degree of an assault with intent to cause fear, the court should incorporate this instruction directly into the first element of the appropriate elements instruction.



**CRIMJIG 13.02****ASSAULT—INFLICTION OF BODILY HARM**

[See CRIMJIG 13.31 for an example of an instruction on Assault—Infliction of Bodily Harm]

The term “assault,” as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word “intentionally.” [To “have knowledge” requires only that the actor believes that the specified facts exist.]

[“Attempted” means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. “With intent to” means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

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**COMMENT**

M.S.A. § 609.02, subd. 10(2).

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**13.02**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.

In cases in which a defendant is charged with a degree of an assault with infliction of bodily harm, the court should incorporate this instruction directly into the first element of the appropriate elements instruction.

**CRIMJIG 13.03**

**ASSAULT IN THE FIRST DEGREE—GREAT BODILY  
HARM—DEFINED**

Under Minnesota law, whoever assaults another person and inflicts great bodily harm is guilty of first degree assault.

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COMMENT

M.S.A. § 609.221, subd. 1.



**CRIMJIG 13.04****ASSAULT IN THE FIRST DEGREE (ASSAULT WITH GREAT BODILY HARM)—ELEMENTS**

The elements of assault in the first degree are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant inflicted great bodily harm on \_\_\_\_\_. "Great bodily harm" means bodily harm that creates a high probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body, or other serious bodily harm. It is not necessary for the State to prove that the defendant intended to inflict great bodily harm, but only that the defendant intended to commit the assault.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.02, subd. 8; M.S.A. § 609.221, subd. 1.

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**13.04**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

In *Johnson v. State*, 421 N.W.2d 327 (Minn. App. 1988), the Court of Appeals stated that the offense of assault in the first degree did not require that the prosecution prove intent to cause great bodily harm.

In *State v. Currie*, 400 N.W.2d 361 (Minn. App. 1987), the Court of Appeals affirmed a conviction for assault in the first degree and rejected the argument that the statute was unconstitutionally vague for failure to further define what was serious bodily harm. The Court also held that the term “serious” was a word of common usage and did not need further definition, thus approving CRIMJIG 13.03 and 13.04.

While *State v. Bridgeforth*, 357 N.W.2d 393 (Minn. App. 1984) held that loss of a tooth satisfied the definition of great bodily harm, because it constituted permanent loss of a bodily member, the question of whether a particular injury constitutes great bodily harm is a question for the jury. *State v. Moore.*, 669 N.W.2d 733 (Minn. 2005).

In *State v. Gerald*, 486 N.W.2d 799 (Minn. App. 1992), the Court of Appeals held that a one-half inch cut near the assault victim’s ear did not qualify as bodily injury that creates high probability of death under the meaning of the first degree assault statute, even though the cut was located near a major vein and artery that could have resulted in death or great bodily harm if the vein or artery had been severed.

**CRIMJIG 13.05**

**ASSAULT IN THE FIRST DEGREE—DEADLY  
FORCE AGAINST PEACE OFFICER, PROSECUTING  
ATTORNEY, JUDGE, CORRECTIONAL OFFICER—  
DEFINED**

Under Minnesota law, whoever assaults a (peace officer) (prosecuting attorney) (judge)(correctional employee) by using or attempting to use deadly force against the (peace officer) (prosecuting attorney) (judge) (correctional employee) while the (officer) (prosecuting attorney) (judge) (employee) is engaged in the performance of a duty imposed by law, policy or rule, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.221, subd. 2.

“Deadly force” is defined in M.S.A. § 609.066, subd. 1. “Peace officer” is defined in M.S.A. § 626.84, subd. 1. “Correctional employee” means an employee of a public or private prison, jail, or work house.



**CRIMJIG 13.06****ASSAULT IN THE FIRST DEGREE—DEADLY  
FORCE AGAINST PEACE OFFICER, PROSECUTING  
ATTORNEY, JUDGE, CORRECTIONAL OFFICER—  
ELEMENTS**

The elements of assault of a (peace officer) (prosecuting attorney) (judge) (correctional employee) are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, \_\_\_\_\_ was a (peace officer) (prosecuting attorney) (judge) (correctional employee) at the time of the assault, and was engaged in the performance of a duty imposed by law, policy, or rule.

Third, the defendant used, or attempted to use, deadly force against \_\_\_\_\_. "Deadly force" means force that the actor uses with the purpose of causing, or the actor should reasonably know creates a substantial risk of causing, death or great bodily harm. [The intentional discharge of a firearm in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force.] "Great bodily harm" means bodily harm that creates a high probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body, or other serious bodily harm.

**13.06**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.221, subd. 2.

“Deadly force” is defined in M.S.A. § 609.066, subd. 1. “Peace officer” is defined in M.S.A. § 626.84, subd. 1. “Correctional employee” means an employee of a public or private prison, jail, or work house. *See* M.S.A. § 609.221, subd. 2(c)(1).

**CRIMJIG 13.07**

**ASSAULT IN THE FIRST DEGREE—UNBORN  
CHILD—GREAT BODILY HARM—DEFINED**

Under Minnesota law, whoever assaults a pregnant woman and inflicts great bodily harm on an unborn child, who is subsequently born alive, is guilty of a crime.

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COMMENT

M.S.A. § 609.267.



**CRIMJIG 13.08****ASSAULT IN THE FIRST DEGREE—UNBORN CHILD—GREAT BODILY HARM—ELEMENTS**

The elements of assault in the first degree are:

First, the defendant assaulted a pregnant woman. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant inflicted great bodily harm on the woman's unborn child who was subsequently born alive. "Great bodily harm" means bodily harm that creates a high probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body, or other serious bodily harm.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**13.08**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

**CRIMJIG 13.09**

**ASSAULT IN THE SECOND DEGREE—DANGEROUS WEAPON—DEFINED**

Under Minnesota law, whoever assaults another with a dangerous weapon is guilty of a crime.

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COMMENT

M.S.A. § 609.222, subd. 1.

**CRIMJIG 13.10****ASSAULT IN THE SECOND DEGREE—DANGEROUS WEAPON—ELEMENTS**

The elements of assault in the second degree are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant, in assaulting \_\_\_\_\_, used a dangerous weapon. (A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.) (A “dangerous weapon” is anything designed as a weapon and capable of producing death or great bodily harm, or any combustible or flammable liquid<sup>2</sup> or anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm or any fire that is used to produce death or great bodily harm.)

Third, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**13.10**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also

stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

<sup>2</sup>A flammable liquid is defined by statute to be: Class I flammable liquids as defined in section 9.108 of the Uniform Fire Code, but not intoxicating liquor as defined in M.S.A. § 340.07. M.S.A. § 609.01, subd. 6.



## COMMENT

M.S.A. § 609.222, subd. 1. Definitions of “dangerous weapon” and “great bodily harm” are drawn from M.S.A. § 609.02, subds. 6 and 8.

Depending on the circumstances of the assault, hands and feet may be “dangerous weapons.” *State v. Davis*, 540 N.W.2d 88 (Minn. App. 1995). Also, bodily injury is not an element of second degree assault. *Id.* at 91. Hands and feet may be a dangerous weapon even if the victim does not suffer great bodily harm. *Id.* at 90.

However, use of fists and/or feet will not always constitute use of a dangerous weapon. *State v. Basting*, 572 N.W.2d 281 (Minn.1997). When determining whether an object, even an inherently dangerous object, is a dangerous weapon, the court must examine not only the nature of the object itself, but also the manner in which it was used. *Id.* at 285.

In *State v. Livingston*, 420 N.W.2d 223 (Minn. App. 1988), the Court of Appeals affirmed a conviction for assault in the second degree when the deadly weapon was a pit bull terrier that had been ordered to attack the victim by its owner.

In *State v. Blawat*, 399 N.W.2d 671 (Minn. App. 1987), the Court of Appeals held that this instruction adequately explained the elements of assault in the second degree, including the element of specific intent.

The definition of dangerous weapon in CRIMJIG 13.10 is different from M.S.A. § 609.02, subd. 6. The language of CRIMJIG 13.10 originally duplicated the language of the statute. However, the definition was challenged for being unconstitutionally vague. *See State v. Jensen*, 373 N.W.2d 364 (Minn. App. 1985); *State v. Graham*, 366 N.W.2d 335 (Minn. App.1985). The Court of Appeals expressed concern that the statute’s use of the term “likely” could be interpreted to improperly dilute the State’s burden of proof. CRIMJIG 13.10 was amended, and its language changed to clarify the State’s burden of proof. The Court noted with approval the model penal code definition of “deadly weapon,” and the Committee has therefore modified the definition of dangerous weapon to conform to these holdings of the Court of Appeals. *See State v. Gebremariam*, 590 N.W.2d 781 (Minn. 1999).

The Supreme Court has held that in a prosecution for aggravated assault, the trial court should have instructed the jury on the definition of “dangerous weapon” and should have explained that a firearm may still be a firearm, even if it is unloaded or temporarily inoperable at time it is used, but the failure to so instruct the jury did not warrant a new trial, in view of fact that even if the trial court had instructed the jury as it should have, the result would have been the same. *LaMere v. State*, 278 N.W.2d 552 (Minn. 1979).

**CRIMJIG 13.11****ASSAULT IN THE SECOND DEGREE—DANGEROUS  
WEAPON—SUBSTANTIAL BODILY HARM—  
DEFINED**

Under Minnesota law, whoever assaults another with a dangerous weapon and inflicts substantial bodily harm is guilty of a crime.

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**COMMENT**

M.S.A. § 609.222, subd. 2.

**CRIMJIG 13.12****ASSAULT IN THE SECOND DEGREE—DANGEROUS  
WEAPON—SUBSTANTIAL BODILY HARM—  
ELEMENTS**

The elements of assault in the second degree are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant, in assaulting \_\_\_\_\_, used a dangerous weapon. (A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.) (A “dangerous weapon” is anything designed as a weapon and capable of producing death or great bodily harm; any combustible or flammable liquid or anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm; or any fire that is used to produce death or great bodily harm.)

Third, the defendant inflicted substantial bodily harm on \_\_\_\_\_. “Substantial bodily harm” means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member. It is not necessary for the State to prove that the defendant intended to inflict substantial bodily harm, but only that the defendant intended to commit the assault.

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**13.12**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.



Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See M.S.A. § 609.02, subds. 6, 7, and 7a for definitions of "dangerous weapon," "bodily harm," and "substantial bodily harm."

**CRIMJIG 13.13**

**ASSAULT IN THE SECOND DEGREE—UNBORN CHILD—SUBSTANTIAL BODILY HARM—DEFINED**

Under Minnesota law, whoever assaults a pregnant woman and inflicts substantial bodily harm on an unborn child, who is subsequently born alive, is guilty of a crime.

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COMMENT

M.S.A. § 609.2671.

**CRIMJIG 13.14****ASSAULT IN THE SECOND DEGREE—UNBORN  
CHILD—SUBSTANTIAL BODILY HARM—  
ELEMENTS**

The elements of assault in the second degree are:

First, the defendant assaulted a pregnant woman. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant inflicted substantial bodily harm on the woman's unborn child who was subsequently born alive. "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member. ["Substantial bodily harm" includes the birth of the unborn child prior to 37 weeks gestation if the child weighs 2,500 grams or less at the time of birth. "Substantial bodily harm" does not include the inducement of the unborn child's birth when done for bona fide medical purposes.<sup>2</sup>]

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**13.14**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

<sup>2</sup>M.S.A. § 609.2671.



**CRIMJIG 13.15**

**ASSAULT IN THE THIRD DEGREE—SUBSTANTIAL  
BODILY HARM—DEFINED**

Under Minnesota law, whoever assaults another and inflicts substantial bodily harm is guilty of a crime.

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COMMENT

M.S.A. § 609.223.

**CRIMJIG 13.16****ASSAULT IN THE THIRD DEGREE—SUBSTANTIAL  
BODILY HARM—ELEMENTS**

The elements of assault in the third degree are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant inflicted substantial bodily harm on \_\_\_\_\_. "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member. It is not necessary for the State to prove that the defendant intended to inflict substantial bodily harm, but only that the defendant intended to commit the assault.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.02, subd. 7a; M.S.A. § 609.223.

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**13.16**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

In *State v. Stafford*, 340 N.W.2d 669 (Minn. 1983), the Supreme Court held that the nose was a “bodily member.”

In *State v. Larkin*, 620 N.W.2d 335 (Minn. App. 2001) the Court of Appeals held that a victim’s temporary loss of consciousness is “substantial bodily harm” for purposes of M.S.A. § 609.223. But note that the question of whether a particular injury constitutes a level of harm is a question for the jury. *State v. Moore*, 669 N.W.2d 733 (Minn. 2005).



**CRIMJIG 13.17**

**ASSAULT IN THE THIRD DEGREE—PAST  
PATTERN OF CHILD ABUSE—MINOR VICTIM—  
DEFINED**

Under Minnesota law, whoever assaults a minor and has engaged in a past pattern of child abuse against the minor is guilty of a crime.

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**COMMENT**

M.S.A. § 609.223, subd. 2.

**CRIMJIG 13.18****ASSAULT IN THE THIRD DEGREE—PAST  
PATTERN OF CHILD ABUSE—MINOR VICTIM—  
ELEMENTS**

The elements of assault in the third degree are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, \_\_\_\_\_ was a minor. A minor is a person who is under the age of eighteen years.

Third, the defendant had engaged in a past pattern of child abuse against \_\_\_\_\_. Minnesota statutes define “child abuse” as \_\_\_\_\_.<sup>2</sup>

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**13.18**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these alternative means into one instruction

as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

<sup>2</sup>See M.S.A. § 609.185(d) for list of violations that constitute “child abuse.”

**CRIMJIG 13.19****ASSAULT IN THE THIRD DEGREE—VICTIM  
UNDER AGE OF FOUR—DEFINED**

Under Minnesota law, whoever assaults a child who is under the age of four and causes bodily harm to the child's head, eyes, or neck, or otherwise causes multiple bruises to the body, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.223, subd. 3.



**CRIMJIG 13.20****ASSAULT IN THE THIRD DEGREE—VICTIM  
UNDER AGE OF FOUR—ELEMENTS**

The elements of assault in the third degree are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, \_\_\_\_\_ was a child under the age of four years.

Third, \_\_\_\_\_ suffered bodily harm to the head, eyes, or neck, or otherwise suffered multiple bruises to the body as a result of the assault. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm, but only that the defendant intended to commit the assault.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**13.20**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

**CRIMJIG 13.21****ASSAULT IN THE FOURTH DEGREE—ON A PEACE OFFICER—DEFINED**

Under Minnesota law, whoever physically assaults a licensed peace officer when the officer is effecting a lawful arrest or executing any other duty imposed by law [and inflicts demonstrable bodily harm or intentionally throws or otherwise transfers bodily fluid or feces at or onto the officer] is guilty of assault in the fourth degree.

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**COMMENT**

M.S.A. § 609.2231, subd. 1

Minnesota law does not authorize a person to use force to resist an allegedly illegal search or seizure by peace officers. *State v. Kutchara*, 350 N.W.2d 924 (Minn. 1984).

**CRIMJIG 13.22****ASSAULT IN THE FOURTH DEGREE—ON A PEACE OFFICER—ELEMENTS**

The elements of assault in the fourth degree on a peace officer as alleged in this case are:

First, the defendant physically assaulted \_\_\_\_\_. [Insert CrimJIG 13.02 for infliction of bodily harm.<sup>1</sup>]

Second, \_\_\_\_\_ was a licensed Minnesota peace officer when the assault occurred.

Third, \_\_\_\_\_ was effecting a lawful arrest or executing any other duty imposed by law when the assault occurred.

[Fourth, the defendant (inflicted demonstrable bodily harm upon \_\_\_\_\_) (or) (intentionally threw or otherwise transferred bodily fluid or feces at or onto \_\_\_\_\_.)]

“Demonstrable bodily harm” means bodily harm that is capable of being perceived by a person other than the victim. “Intentionally” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, the actor must have knowledge of those facts which are necessary to make the actor’s conduct criminal and which are set forth after the word “intentionally.”]

[Fourth] or [Fifth], the defendant’s act took place on or about \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**13.22**

<sup>1</sup>Under M.S.A. § 609.2231, subd. 1, an assault on a peace officer must

be a physical assault, i.e., an act that attempt to inflict bodily harm rather than an act with intent to cause fear.



**COMMENT**

M.S.A. § 609.2231, subd. 1

The definition of demonstrable bodily harm comes from *State v. Backus*, 358 N.W.2d 93 (Minn. App. 1984).

**CRIMJIG 13.23**

**ASSAULT IN THE FOURTH DEGREE—MOTIVATED  
BY BIAS—DEFINED**

Under Minnesota law, whoever assaults another because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age, or national origin, is guilty of a crime.

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COMMENT

M.S.A. § 609.2231, subd. 4

**CRIMJIG 13.24****ASSAULT IN THE FOURTH DEGREE—MOTIVATED  
BY BIAS—ELEMENTS**

The elements of assault in the fourth degree as alleged in this case are:

First, the defendant assaulted \_\_\_\_\_. [Insert CrimJIG 13.01 for assault with intent to cause fear. Insert CrimJIG 13.02 for assault — infliction of bodily harm. Insert both CrimJIG 13.01 and 13.02 if the assault charge is a combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant assaulted \_\_\_\_\_ because of \_\_\_\_\_'s (or another's) actual or perceived (race) (color) (religion) (sex) (sexual orientation) (disability, which includes \_\_\_\_\_<sup>2</sup>) (age) (national origin).

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[If you find the defendant guilty, you have another issue to determine, and it will be put to you in the form of a question on the verdict form. The question: Has the defendant within the past five years been convicted of an assault in the fourth degree motivated by bias? You shall answer the question "Yes" or "No." If you have a reasonable doubt as to the answer, you should

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**13.24**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these alternative means into one instruction

as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

<sup>2</sup>Disability is defined in M.S.A. § 363A.03.



answer the question “No.”]

\_\_\_\_\_

COMMENT

M.S.A. § 609.2231, subd. 4

**CRIMJIG 13.25**

**ASSAULT IN THE FOURTH DEGREE—ON A  
VULNERABLE ADULT—DEFINED**

Under Minnesota law, whoever assaults and inflicts demonstrable bodily harm on a vulnerable adult, knowing or having reason to know that the person is a vulnerable adult, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2231, subd. 8

**CRIMJIG 13.26****CRIMINAL ASSAULT—VULNERABLE ADULT—  
ELEMENTS**

The elements of criminal assault of a vulnerable adult are:

First, the defendant assaulted \_\_\_\_\_. [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, \_\_\_\_\_ (the victim) was a vulnerable adult. A “vulnerable adult” is a person who is 18 years of age or older who (is a resident inpatient of a facility) (receives services at or from a facility required to be licensed by the Commissioner of Human Services to serve adults, except that a person who receives outpatient services for treatment of chemical dependency or mental illness or who has been committed as a sexual psychopathic personality or sexually dangerous person is not considered a vulnerable adult unless that person possesses physical or mental infirmity or there is physical or mental emotional dysfunction that impairs the person’s ability to provide adequately for his or her own care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment) (receives services from a home care provider licensed by the Commissioner of Human Services or from a person or organization that exclusively offers, provides, or arranges for personal care assistance services) (regardless of residence or whether any type of service is received, possesses a

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**13.26**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.



physical or mental infirmity or other physical, mental, or emotional dysfunction that impairs the person's ability to provide adequately for his or her care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment).

Third, defendant knew or had reason to know that \_\_\_\_\_ (the victim) was a vulnerable adult.

Fourth, the defendant inflicted demonstrable bodily harm upon \_\_\_\_\_ (the victim). "Demonstrable bodily harm" means bodily harm that is capable of being perceived by a person other than the victim.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt the defendant is not guilty.

**CRIMJIG 13.27****ASSAULT IN THE FOURTH DEGREE ON A  
CORRECTIONAL EMPLOYEE, PROBATION  
OFFICER, TRANSIT OPERATOR, ETC.—  
INFLECTING BODILY HARM OR THROWING  
BODILY FLUIDS, ETC.—DEFINED**

Under Minnesota law, whoever assaults a person and inflicts [demonstrable] bodily harm or intentionally throws or otherwise transfers bodily fluids or feces at or onto the person, and the person is \_\_\_\_\_, [Insert from the following list]

- [1] a correctional facility employee
- [2] a prosecuting attorney
- [3] a judge
- [4] a probation officer or other qualified person employed in supervising offenders
- [5] an employee or other individual who provides care or treatment at a secure treatment facility
- [6] a transit operator

when that person is engaged in the performance of her or his duties, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2231, subds. 3, 3a, and 11

**CRIMJIG 13.28****ASSAULT IN THE FOURTH DEGREE ON  
CORRECTIONAL EMPLOYEE, PROBATION  
OFFICER, TRANSIT WORKER, ETC.—INFLECTING  
DEMONSTRABLE BODILY HARM OR THROWING  
BODILY FLUIDS, ETC.—ELEMENTS**

The elements of assault in the fourth degree as alleged in this case, are:

[Utilizing the numbers listed in CrimJIG 13.27]

[1] – [5] First, the defendant assaulted \_\_\_\_\_ and inflicted demonstrable bodily harm. [Insert CrimJIG 13.01 for assault with intent to cause fear. Insert CrimJIG 13.02 for assault — infliction of bodily harm. Insert both CrimJIG 13.01 and 13.02 if the assault charge is a combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

“Demonstrable bodily harm” means bodily harm that is capable of being perceived by a person other than the victim.

[First, the defendant intentionally threw or otherwise transferred bodily fluids or feces at or onto \_\_\_\_\_. “Intentionally” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, the actor must have knowledge of those facts which are necessary to make the actor’s conduct criminal and which are set forth after the word “intentionally.”]

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**13.28**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.



- [1] Second, \_\_\_\_\_ was a correctional employee at the time of the assault. "Correctional employee" means an employee of a public or private prison, jail or workhouse.
- [2] Second, \_\_\_\_\_ was a prosecuting attorney at the time of the assault. A "prosecuting attorney" includes \_\_\_\_\_. (See M.S.A. § 609.221, subd. 2(c)(4)).
- [3] Second, \_\_\_\_\_ was a judge at the time of the assault. "Judge" means a judge or justice of any court of this state established by the Minnesota Constitution.
- [4] Second, \_\_\_\_\_ was a probation officer or other qualified person supervising offenders.
- [1] – [4] Third, \_\_\_\_\_ was engaged in the performance of a duty imposed by law, policy or rule at the time of the defendant's act.
- [5] Second, the defendant was committed for treatment under Minnesota law as a civilly committed sexual offender, [a sexually dangerous person], [a person with a psychopathic personality], [a person with a sexual psychopathic personality], [or] [a person who is mentally ill and dangerous to the public].

Third, \_\_\_\_\_ was an employee or other individual who provides care or treatment at a secure treatment facility. "Secure treatment facility" includes \_\_\_\_\_. (See M.S.A. § 253D.02, subd. 13)

Fourth, \_\_\_\_\_ was engaged in the performance of a duty imposed by law, policy or rule at the time of the defendant's act.

- [6] First, the defendant assaulted \_\_\_\_\_. [Insert CrimJIG 13.01 for assault with intent to cause fear. Insert CrimJIG 13.02 for assault — infliction of bodily harm. Insert both CrimJIG 13.01 and 13.02 if the assault charge is a combined intent to cause fear and infliction of bodily harm.'] Or the defendant intentionally threw or otherwise transferred bodily fluids onto \_\_\_\_\_. "Intentionally" means that the

actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word "intentionally."

Second, \_\_\_\_\_ was a transit operator. "Transit operator" means a driver or operator of a transit vehicle that is used to provide services including \_\_\_\_\_. (See M.S.A. § 609.2231, subd. 11(d))

Third, \_\_\_\_\_ was acting in the course of a transit operator's duties and was operating a transit vehicle, aboard a transit vehicle, or otherwise responsible for a transit vehicle at the time of the defendant's act.

[1] – [6] [Fourth] [Fifth], the defendant's act took place on or about \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.2231, subds. 3, 3a, and 11

The definition of demonstrable bodily harm comes from *State v. Backus*, 358 N.W.2d 93 (Minn. App. 1984), although the Minnesota Court of Appeals noted that in the Committee's previous comment (3rd Ed.) the term "demonstrable" was a word of common usage, but it was not error for the court to define it by use of a dictionary definition of the word "demonstrable."

**CRIMJIG 13.29****ASSAULT IN THE FOURTH DEGREE—ON  
FIREFIGHTER, EMERGENCY MEDICAL SERVICE  
PROVIDER, SCHOOL OFFICIAL, ETC.—  
INFLICTING DEMONSTRABLE BODILY HARM—  
DEFINED**

Under Minnesota law, whoever assaults a person and inflicts demonstrable bodily harm upon that person who is \_\_\_\_\_ [Insert from the following list]

- [1] A member of a municipal or volunteer fire department;
- [2] An emergency medical services personnel;
- [3] A physician, nurse or other person providing health-care services in a hospital emergency department;
- [4] An employee of the Department of Natural Resources engaged in forest fire activities;
- [5] A school official;
- [6] An agricultural inspector;
- [7] An occupational safety and health investigator;
- [8] A child protection worker;
- [9] A public health nurse;
- [10] An animal control officer;
- [11] A probation or parole officer;
- [12] A community crime prevention group member;
- [13] A reserve officer;
- [14] An employee or contractor of a utility or the United States Postal Service.



engaged in the performance of the duties of the position [and defendant knows or reason to know the person's position and duties] is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2231, subds. 2, 2a, 5, 6, 7, 9, and 10

**CRIMJIG 13.30****ASSAULT IN THE FOURTH DEGREE—ON  
FIREFIGHTER, EMERGENCY MEDICAL SERVICE  
PROVIDER, SCHOOL OFFICIAL, ETC.—ELEMENTS**

The elements of assault in the fourth degree upon a \_\_\_\_\_ [Insert from list in CrimJIG 13.28] as alleged in this case are:

[Utilizing the numbers listed in CrimJIG 13.28]

[1] – [14] First, the defendant assaulted \_\_\_\_\_. [Insert CrimJIG 13.01 for assault with intent to cause fear. Insert CrimJIG 13.02 for assault — infliction of bodily harm. Insert both CrimJIG 13.01 and 13.02 if the assault charge is a combined intent to cause fear and infliction of bodily harm.<sup>1</sup>]

Second, the defendant inflicted demonstrable bodily harm upon \_\_\_\_\_. “Demonstrable bodily harm” means bodily harm that is capable of being perceived by a person other than the victim.

Third, \_\_\_\_\_ was \_\_\_\_\_ [insert from the list in CrimJIG 13.28] at the time of the assault.

[5] “School official” includes teachers, school administrators, and other employees of a public or private school;

[12] “Community crime prevention group” means a community group focused on community safety and crime prevention that: \_\_\_\_\_ [See M.S.A. § 609.2231(d)];

**13.30**

<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

[13] "Reserve officer" means an individual whose services are utilized by a law enforcement agency to provide services including \_\_\_\_\_ [See M.S.A. § 626.84, subd. 1(e)];

[14] The meaning of "utility" includes \_\_\_\_\_ [See M.S.A. § 609.594, subd. 1(3)].

[5] Fourth, \_\_\_\_\_ was engaged in the performance of the duties of a school official at the time of the assault.

[6] – [11] Fourth, \_\_\_\_\_ was engaged in the performance of a duty mandated by law, court order, or ordinance at the time of the assault.

Fifth, the defendant knew that \_\_\_\_\_ was a public employee engaged in the performance of the official duties of the office.

[12] Fourth, \_\_\_\_\_ was engaged in neighborhood patrol duties at the time of the assault.

Fifth, the defendant should reasonably have known that \_\_\_\_\_ was a community crime prevention group member engaged in a neighborhood patrol.

[13] Fourth, \_\_\_\_\_ was engaged in the performance of official duties at the direction of, under the control of, or on behalf of a peace officer or supervising law enforcement officer or agency at the time of the assault.

Fifth, the defendant should reasonably have known that \_\_\_\_\_ was a reserve officer engaged in the performance of official public duties of the peace officer, or supervising law enforcement officer or agency.

[14] Fourth, \_\_\_\_\_ was engaged in the performance of the duties of an employee or contractor of a utility or the United States Postal Service at the time of the assault.

Fifth, the defendant should reasonably have known that \_\_\_\_\_ was an employee or contractor of a utility or the Postal



Service who was performing the duties of employment or fulfilling contractual obligations.

[Fourth] [Fifth] [Sixth], the defendant's act occurred on or about \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.2231, subds. 2, 2a, 5, 6, 7, 9, and 10

The definition of demonstrable bodily harm comes from *State v. Backus*, 358 N.W.2d 93 (Minn. App. 1984), although the Minnesota Court of Appeals noted that in the Committee's previous comment (3rd Ed.) the term "demonstrable" was a word of common usage, but it was not error for the court to define it by use of a dictionary definition of the word "demonstrable."

**CRIMJIG 13.31**

**ASSAULT IN THE FIFTH DEGREE—INTENT TO  
CAUSE FEAR OR INFLICT BODILY HARM—  
DEFINED**

**Under Minnesota law, whoever**

**[1] commits an act with intent to cause fear in another of  
immediate bodily harm or death**

**[or]**

**[2] intentionally inflicts or attempts to inflict bodily harm  
upon another**

**is guilty of a crime.**

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**COMMENT**

**M.S.A. § 609.224, subd. 1.**

**CRIMJIG 13.32****ASSAULT IN THE FIFTH DEGREE—INTENT TO  
CAUSE FEAR—ELEMENTS**

The elements of assault are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault,” as used in this (case) (charge), means an act done with intent to cause \_\_\_\_ (the victim) to fear immediate bodily harm or death.

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.]

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.224, subd. 1(1).

In *State v. Oden*, 385 N.W.2d 420 (Minn. App. 1986), the Court of Appeals reversed the defendant’s conviction for assault in the fifth degree, in part for the trial court’s failure to instruct on the meaning of intent as defined in M.S.A. § 609.02, subd. 9(3) and (4).

On proof of intent, see *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377



(1971).

**CRIMJIG 13.33****ASSAULT IN THE FIFTH DEGREE—INFLICTION OF  
BODILY HARM—ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant assaulted \_\_\_\_.

The term "assault," as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

"Bodily harm" means physical pain or injury, illness, or any impairment of a person's physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.]

"Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor's conduct criminal and that are set forth after the word "intentionally." [To "have knowledge" requires only that the actor believes that the specified facts exist.]

["Attempted" means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. "With intent to" means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

Second, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable

**doubt, the defendant is not guilty.**

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**COMMENT**

M.S.A. § 609.224, subd. 1(2).



**CRIMJIG 13.34****ASSAULT IN THE FIFTH DEGREE—PRIOR  
CONVICTION AGAINST SAME VICTIM WITHIN TEN  
YEARS—FELONY—DEFINED**

Under Minnesota law whoever, within ten years of the first of any combination of two or more previous qualified domestic violence-related offense [convictions] [or] [adjudications of delinquency], assaults another is guilty of a crime, if the person assaulted is \_\_\_\_\_ [the same person who was the victim of the prior assault].

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**COMMENT**

M.S.A. § 609.224, subd. 4(a).

In the event that the defendant stipulates to the prior convictions, the court should accept that stipulation. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984); *State v. Clark*, 375 N.W.2d 59 (Minn. App. 1985). In such cases, the Committee recommends use of the appropriate provisions of CRIMJIG 13.29 to 13.31, even though a guilty verdict would be for a felony offense.

**CRIMJIG 13.35****ASSAULT IN THE FIFTH DEGREE—PRIOR  
CONVICTION AGAINST SAME VICTIM WITHIN TEN  
YEARS—FELONY—INTENT TO CAUSE FEAR—  
ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault” as used in this (case) (charge) means an act done with intent to cause \_\_\_\_ (the victim) to fear immediate bodily harm or death.

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, the defendant’s act took place within ten years of the first of any combination of two or more previous qualified domestic violence-related offense<sup>2</sup> [convictions][or][adjudications of delinquency].

Third, \_\_\_\_\_ (the victim) was the victim of the prior assaults by the defendant.

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**13.35**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruction should be given with the definitions of assault in the second degree

and assault in the fifth degree.

<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.224, subd. 4(1).



**CRIMJIG 13.36****ASSAULT IN THE FIFTH DEGREE—PRIOR  
CONVICTION AGAINST SAME VICTIM WITHIN TEN  
YEARS—FELONY—INTENT TO INFLICT BODILY  
HARM—ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault,” as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word “intentionally.” [To “have knowledge” requires only that the actor believes that the specified facts exist.]

[“Attempted” means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. “With intent to” means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

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**13.36**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.

Second, the defendant's act took place within ten years of the first of any combination of two or more previous qualified domestic violence-related offense<sup>2</sup> [convictions][or][adjudications of delinquency].

Third, \_\_\_\_\_ was the victim of that prior assault by the defendant.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

\_\_\_\_\_  
COMMENT

M.S.A. § 609.224, subd. 4(a).

\_\_\_\_\_  
<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.

**CRIMJIG 13.37****ASSAULT IN THE FIFTH DEGREE—PRIOR  
CONVICTION AGAINST THE SAME VICTIM WITHIN  
TEN YEARS—INTENT TO CAUSE FEAR OR  
INFLICT BODILY HARM—GROSS MISDEMEANOR—  
DEFINED**

Under Minnesota law, whoever, within ten years of a previous qualified domestic violence-related offense<sup>1</sup> [conviction][or][adjudication of delinquency],

[1] commits an act with intent to cause fear in another of immediate bodily harm or death

[or]

[2] intentionally inflicts or attempts to inflict bodily harm upon another

is guilty of a crime, if the person assaulted is the same person who was the victim of the prior assault.

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**COMMENT**

M.S.A. § 609.224, subd. 2(a).

If the defendant stipulates to a prior conviction, the court should accept the stipulation. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984); *State v. Allen*, 375 N.W.2d 82 (Minn. App. 1985); *State v. Clark*, 375 N.W.2d 59 (Minn. App. 1985). In such cases, the Committee recommends use of the appropriate provisions of CRIMJIGs 13.29 to 13.31, even though a guilty verdict would be for a gross misdemeanor offense.

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**13.37**

<sup>1</sup>See M.S.A. § 609.02, subd. 16,

for the definition of a previous qualified domestic violence-related offense.



**CRIMJIG 13.38****ASSAULT IN THE FIFTH DEGREE—PRIOR  
CONVICTION AGAINST THE SAME VICTIM WITHIN  
TEN YEARS—INTENT TO CAUSE FEAR—GROSS  
MISDEMEANOR—ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant committed an act with the intent to cause \_\_\_\_\_ to fear of immediate bodily harm or death."

The term "assault" as used in this (case) (charge) means an act done with intent to cause \_\_\_\_ (the victim) to fear immediate bodily harm or death.

"Bodily harm" means physical pain or injury, illness, or any impairment of a person's physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

"With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, the defendant's act took place within ten years of a previous qualified domestic violence-related offense<sup>2</sup> [conviction][or][adjudication of delinquency],

Third, \_\_\_\_\_ (the victim) was the victim of the prior assault by the defendant.

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**13.38**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruction should be given with the definitions of assault in the second degree

and assault in the fifth degree.

<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a previous qualified domestic violence-related offense.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

\_\_\_\_\_  
**COMMENT**

M.S.A. § 609.224, subd. 2(a).

**CRIMJIG 13.39****ASSAULT IN THE FIFTH DEGREE—PRIOR  
CONVICTION AGAINST THE SAME VICTIM WITHIN  
TEN YEARS—INTENT TO INFLICT BODILY HARM—  
GROSS MISDEMEANOR—ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant intentionally inflicted or attempted to inflict bodily harm on \_\_\_\_\_.

The term “assault,” as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word “intentionally.” [To “have knowledge” requires only that the actor believes that the specified facts exist.]

[“Attempted” means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. “With intent to” means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

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**13.39**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.



Second, the defendant's act took place within ten years of a previous qualified domestic violence-related offense<sup>2</sup> [conviction][or][adjudication of delinquency],

Third, \_\_\_\_\_ was the victim of that prior assault by the defendant.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.224, subd. 2(a).

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<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a previous qualified domestic violence-related offense.

**CRIMJIG 13.40****ASSAULT IN THE FIFTH DEGREE—PRIOR  
ASSAULT WITHIN THREE YEARS—FELONY—  
INTENT TO CAUSE FEAR OR INFLICT BODILY  
HARM—DEFINED**

Under Minnesota law, whoever, within three years of the first of any combination of two or more previous qualified domestic violence-related offense [convictions] [or] [adjudications of delinquency]

[1] commits an act with intent to cause fear in another of immediate bodily harm or death

[or]

[2] intentionally inflicts or attempts to inflict bodily harm upon another

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.224, subd. 4(b).

In the event that the defendant stipulates to the prior convictions, the court should accept that stipulation. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984); *State v. Allen*, 375 N.W.2d 82 (Minn. App. 1985); *State v. Clark*, 375 N.W.2d 59 (Minn. App. 1985). In such cases, the Committee recommends use of the appropriate provisions of CRIMJIGs 13.29 to 13.31, even though a guilty verdict would be for a felony offense.

**CRIMJIG 13.41****ASSAULT IN THE FIFTH DEGREE—PRIOR  
ASSAULT WITHIN THREE YEARS—FELONY—  
INTENT TO CAUSE FEAR—ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault” as used in this (case) (charge) means an act done with intent to cause \_\_\_\_ (the victim) to fear immediate bodily harm or death.

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, the defendant’s act took place within three years of the first of any combination of two or more previous qualified domestic violence-related offense<sup>2</sup> [convictions][or][adjudications of delinquency].

Third, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find

13.41

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruction should be given with the definitions of assault in the second degree

and assault in the fifth degree.

<sup>2</sup>See M.S.A. § 609.02, subd. 16, for list of qualified domestic violence-related offenses.



that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.224, subd. 4(b).

**CRIMJIG 13.42****ASSAULT IN THE FIFTH DEGREE—PRIOR  
ASSAULT WITHIN THREE YEARS—FELONY—  
INTENT TO INFLICT BODILY HARM—ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant intentionally inflicted or attempted to inflict bodily harm on \_\_\_\_\_. “Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition.

Second, the defendant’s act took place within three years of the first of defendant’s two or more previous qualified domestic violence related offense<sup>1</sup> [convictions] [adjudications of delinquency].

Third, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.224, subd. 4(b).

In *State v. Hanson*, 583 N.W.2d 4 (Minn. App. 1998), the Court of Appeals held that two prior assault convictions, arising from separate incidents but plead to on the same day, were two prior convictions for purposes of enhanced felony charges.

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**13.42**

<sup>1</sup>See M.S.A. § 609.02, subd. 16,

for list of qualified domestic violence related offenses.

**CRIMJIG 13.43****ASSAULT IN THE FIFTH DEGREE—PRIOR  
ASSAULT WITHIN THREE YEARS—GROSS  
MISDEMEANOR—INTENT TO CAUSE FEAR OR  
INFLICT BODILY HARM—DEFINED**

The statutes of Minnesota provide that whoever, within three years of a previous qualified domestic violence-related offense [conviction] [or] [adjudication of delinquency],

[1] commits an act with intent to cause fear in another of immediate bodily harm or death

[or]

[2] intentionally inflicts or attempts to inflict bodily harm upon another

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.224, subd. 2(b).

In the event that the defendant stipulates to a prior conviction, the court should accept that stipulation. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984); *State v. Allen*, 375 N.W.2d 82 (Minn. App. 1985); *State v. Clark*, 375 N.W.2d 59 (Minn. App. 1985). In such cases, the Committee recommends use of the appropriate provisions of CRIMJIG 13.29 to 13.31, even though a guilty verdict would be a conviction for a gross misdemeanor offense.



**CRIMJIG 13.44****ASSAULT IN THE FIFTH DEGREE—PRIOR  
ASSAULT WITHIN THREE YEARS—GROSS  
MISDEMEANOR—INTENT TO CAUSE FEAR—  
ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant assaulted \_\_\_\_\_.

The term "assault" as used in this (case) (charge) means an act done with intent to cause \_\_\_\_\_ (the victim) to fear immediate bodily harm or death.

"Bodily harm" means physical pain or injury, illness, or any impairment of a person's physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

"With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, the defendant's act took place within three years of the defendant's previous qualified domestic violence-related<sup>2</sup> [conviction] [or] [adjudication of delinquency].

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven be-

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**13.44**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruction should be given with the definitions of assault in the second degree and assault in the fifth degree.

<sup>2</sup>See M.S.A. § 609.02, subd 16, for list of qualified domestic violence-related offenses. Defendant may stipulate to the prior conviction and remove this element from the jury's consideration. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984).

yond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.224, subd. 2(b).

**CRIMJIG 13.45****ASSAULT IN THE FIFTH DEGREE—PRIOR  
ASSAULT WITHIN THREE YEARS—GROSS  
MISDEMEANOR—INTENT TO INFLICT BODILY  
HARM—ELEMENTS**

The elements of assault in the fifth degree are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault,” as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word “intentionally.” [To “have knowledge” requires only that the actor believes that the specified facts exist.]

[“Attempted” means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. “With intent to” means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

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**13.45**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.



Second, the defendant's act took place within three years of the defendant's previous qualified domestic violence-related<sup>2</sup> [conviction] [or] [adjudication of delinquency].

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

COMMENT

M.S.A. § 609.224, subd. 2(b).

<sup>2</sup>See M.S.A. § 609.02, subd 16, for list of qualified domestic violence-related offenses. Defendant may stipulate to the prior conviction and remove

this element from the jury's consideration. State v. Davidson. 351 N.W.2d 8 (Minn. 1984).

**CRIMJIG 13.46**

**DOMESTIC ASSAULT—INTENT TO CAUSE FEAR  
OR INFLICT BODILY HARM—DEFINED**

**Under Minnesota law, whoever**

**[1] commits an act with intent to cause fear in a family or  
household member of immediate bodily harm or death**

**[or]**

**[2] intentionally inflicts or attempts to inflict bodily harm  
upon a family or household member**

**is guilty of a crime.**

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**COMMENT**

**M.S.A. § 609.2242, subd. 1.**

**CRIMJIG 13.47****DOMESTIC ASSAULT—INTENT TO CAUSE FEAR—  
ELEMENTS**

The elements of domestic assault are:

First, the defendant assaulted \_\_\_\_\_ (the victim).

The term "assault" as used in this (case) (charge) means an act done with intent to cause \_\_\_\_ (the victim) to fear immediate bodily harm or death.

"Bodily harm" means physical pain or injury, illness, or any impairment of a person's physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

"With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, \_\_\_\_\_ was a member of the defendant's family or household. The statutes define a family or household member as including \_\_\_\_\_.<sup>2</sup>

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable

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13.47

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruction should be given with the definitions of assault in the second degree

and assault in the fifth degree.

<sup>2</sup>See M.S.A. § 518B.01, subd. 2(b), for definition of a family or household member.



**doubt, the defendant is not guilty.**

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**COMMENT**

M.S.A. § 609.2242, subd. 1(1).

**CRIMJIG 13.48****DOMESTIC ASSAULT—INTENT TO INFLICT  
BODILY HARM—ELEMENTS**

The elements of domestic assault are:

First, the defendant intentionally inflicted or attempted to inflict bodily harm on \_\_\_\_\_.

The term “assault,” as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word “intentionally.” [To “have knowledge” requires only that the actor believes that the specified facts exist.]

[“Attempted” means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. “With intent to” means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

Second, \_\_\_\_\_ was a member of the defendant’s family

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**13.48**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.

or household. The statutes define a family or household member as including \_\_\_\_\_.<sup>2</sup>

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.2242, subd. 1(2).

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<sup>2</sup>See M.S.A. 518B.01, subd. 2(b), member.  
for definition of family or household



**CRIMJIG 13.49****DOMESTIC ASSAULT—PRIOR CONVICTION  
WITHIN TEN YEARS—FELONY—INTENT TO CAUSE  
FEAR OR INFLICT BODILY HARM—DEFINED**

Under Minnesota law, whoever, within ten years of the first of any combination of two or more previous qualified domestic violence-related offense [convictions][or][adjudications of delinquency],

[1] commits an act with intent to cause fear in another of immediate bodily harm or death

[or]

[2] intentionally inflicts or attempts to inflict bodily harm upon another

is guilty of a crime, if the person assaulted is a member of the defendant's family or household.

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**COMMENT**

M.S.A. § 609.2242, subd. 2.

If the defendant stipulates to a prior conviction, the court should accept the stipulation. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984); *State v. Allen*, 375 N.W.2d 82 (Minn. App. 1985); *State v. Clark*, 375 N.W.2d 59 (Minn. App. 1985). In such cases, the Committee recommends use of the appropriate provisions of CRIMJIGs 13.44 to 13.46, even though a guilty verdict would be for a gross misdemeanor offense.

**CRIMJIG 13.50****DOMESTIC ASSAULT—PRIOR CONVICTION  
WITHIN TEN YEARS—FELONY—INTENT TO CAUSE  
FEAR OR INFLICT BODILY HARM—ELEMENTS**

The elements of domestic assault are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault” as used in this (case) (charge) means an act done with intent to cause \_\_\_\_ (the victim) to fear immediate bodily harm or death.

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, the defendant’s act took place within ten years of the first of any combination of two or more previous qualified domestic violence-related offense<sup>2</sup> [convictions][or][adjudications of delinquency].

Third, \_\_\_\_\_ was a member of the defendant’s family or household. The statutes define a family or household member as including \_\_\_\_\_.<sup>3</sup>

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**13.50**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruction should be given with the definitions of assault in the second degree and assault in the fifth degree.

<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.

<sup>3</sup>See M.S.A. 518B.01, subd. 2(b), for definition of family or household member.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



**CRIMJIG 13.51****DOMESTIC ASSAULT—PRIOR CONVICTION  
WITHIN TEN YEARS—FELONY—INTENT TO  
INFLICT BODILY HARM—ELEMENTS**

The elements of domestic assault are:

First, the defendant assaulted \_\_\_\_\_.

The term "assault," as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

"Bodily harm" means physical pain or injury, illness, or any impairment of a person's physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

"Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor's conduct criminal and that are set forth after the word "intentionally." [To "have knowledge" requires only that the actor believes that the specified facts exist.]

["Attempted" means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. "With intent to" means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

Second, the defendant's act took place within ten years of

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**13.51**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.

the first of any combination of two or more previous qualified domestic violence-related offense<sup>2</sup> [convictions] [or] [adjudications of delinquency].

Third, \_\_\_\_\_ was a member of the defendant's family or household. The statutes define a family or household member as including \_\_\_\_\_.<sup>3</sup>

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.

<sup>3</sup>See M.S.A. 518B.01, subd. 2(b), for definition of family or household member.

**CRIMJIG 13.52****DOMESTIC ASSAULT—PRIOR CONVICTION OR  
ADJUDICATION WITHIN TEN YEARS—GROSS  
MISDEMEANOR—INTENT TO CAUSE FEAR OR  
INFLECT BODILY HARM—DEFINED**

Under Minnesota law, whoever, within ten years of a previous qualified domestic violence-related offense<sup>1</sup> [conviction][or][adjudication of delinquency],

[1] commits an act with intent to cause fear in another of immediate bodily harm or death

[or]

[2] intentionally inflicts or attempts to inflict bodily harm upon another

is guilty of a crime, if the person assaulted is a member of the defendant's family or household.

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**COMMENT**

M.S.A. § 609.2242, subd. 2.

If the defendant stipulates to a prior conviction, the court should accept the stipulation. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984); *State v. Allen*, 375 N.W.2d 82 (Minn. App. 1985); *State v. Clark*, 375 N.W.2d 59 (Minn. App. 1985). In such cases, the Committee recommends use of the appropriate provisions of CRIMJIGs 13.44 to 13.46, even though a guilty verdict would be for a gross misdemeanor offense.

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**13.52**

<sup>1</sup>See M.S.A. § 609.02, subd. 16,

for the definition of a previous qualified domestic violence-related offense.



**CRIMJIG 13.53****DOMESTIC ASSAULT—PRIOR CONVICTION  
WITHIN TEN YEARS—GROSS MISDEMEANOR—  
INTENT TO CAUSE FEAR—ELEMENTS**

The elements of domestic assault are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault” as used in this (case) (charge) means an act done with intent to cause \_\_\_\_\_ (the victim) to fear immediate bodily harm or death.

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that \_\_\_\_\_ would fear that the defendant would so act. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

Second, the defendant’s act took place within ten years of a previous qualified domestic violence-related offense<sup>2</sup> [conviction][or][adjudication of delinquency].

Third, \_\_\_\_\_ was a member of the defendant’s family or household. The statutes define a family or household member as including \_\_\_\_\_.<sup>3</sup>

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**13.53**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruction should be given with the definitions of assault in the second degree and assault in the fifth degree.

<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a previous qualified domestic violence-related offense.

<sup>3</sup>See M.S.A. 518B.01, subd. 2(b), for definition of family or household member.

Fourth, the defendant's act took place on (or about)  
\_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 13.54****DOMESTIC ASSAULT—PRIOR CONVICTION  
WITHIN TEN YEARS—GROSS MISDEMEANOR—  
INTENT TO INFLICT BODILY HARM—ELEMENTS**

The elements of domestic assault are:

First, the defendant assaulted \_\_\_\_\_.

The term “assault,” as used in this (charge) (case) is the intentional infliction of bodily harm upon another [or the attempt to inflict bodily harm upon another].

“Bodily harm” means physical pain or injury, illness, or any impairment of a person’s physical condition. [In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.<sup>1</sup>]

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word “intentionally.” [To “have knowledge” requires only that the actor believes that the specified facts exist.]

[“Attempted” means that the actor did an act which was a substantial step toward, and more than mere preparation for, causing the result, and that the actor did that act with intent to cause that result. “With intent to” means that the actor either had a purpose to do the thing or cause the result specified, or believed that the act, if successful, will cause that result. [Here insert CRIMJIGs 5.01 and 5.02 on Attempt if appropriate.]]

Second, the defendant’s act took place within ten years of

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**13.54**

<sup>1</sup>See *State v. Ott*, 291 Minn. 72, 189 N.W.2d 377 (1971). This instruc-

tion should be given with the definitions of assault in the second degree and assault in the fifth degree.



a previous qualified domestic violence-related offense<sup>2</sup> [conviction][or][adjudication of delinquency],

Third, \_\_\_\_\_ was a member of the defendant's family or household. The statutes define a family or household member as including \_\_\_\_\_.<sup>3</sup>

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a previous qualified domestic violence-related offense.

<sup>3</sup>See M.S.A. 518B.01, subd. 2(b), for definition of family or household member.

**CRIMJIG 13.55****VIOLATION OF (AN ORDER FOR PROTECTION) (A DOMESTIC ABUSE NO CONTACT ORDER) (A RESTRAINING ORDER)—DEFINED**

Under Minnesota law, whoever violates (an order for protection) (a domestic abuse no contact order) (a restraining order) granted pursuant to the Domestic Abuse Act, or similar law of another State, and knows of the existence of the order, is guilty of a crime.

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**COMMENT**

M.S.A. § 518B.01, subd. 14; M.S.A. § 629.75, subd. 2.

**CRIMJIG 13.56**

**VIOLATION OF (AN ORDER FOR PROTECTION) (A DOMESTIC ABUSE NO CONTACT ORDER) (A RESTRAINING ORDER)—ELEMENTS**

The elements of violation of (an order for protection) (a domestic abuse no contact order) (restraining order) are:

First, there was an existing court (order for protection) (domestic abuse no contact order) (restraining order).

Second, the defendant knew of the existence of the order.

Third, the defendant violated a term or condition of the order.

[Fourth, the defendant committed this crime within ten years of conviction for a previous qualified domestic violence-related offense,<sup>1</sup>]

[Fourth, the defendant committed this crime within ten years of the first of defendant's two or more previous qualified domestic violence-related offense.<sup>2</sup>]

[Fourth, the defendant possessed a dangerous weapon while committing the crime. A "dangerous weapon" means any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.]

[1] Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

**13.56**

<sup>1</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.

<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.



- [2] Fifth, on (or about) \_\_\_\_\_ (the defendant made a call to the victim) (the victim received a call from the defendant) (the defendant made a wireless or electronic communication or any communication made through any available technology from \_\_\_\_\_ where the defendant resides) (the victim received a wireless or electronic communication or any communication made through any available technology from the defendant in \_\_\_\_\_ where the victim resides) in \_\_\_\_\_ County.
- [3] Fifth, the act occurred on (or about) \_\_\_\_\_ and the victim resides in \_\_\_\_\_ County and the victim participates in the address confidentiality program.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

If the defendant stipulates to a prior conviction, the court should accept that stipulation and remove that element from the jury. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984).

As part of the third element, it is advisable to insert the specific term(s) or condition(s) alleged to have been violated. In the event it is alleged that the defendant violated the protective order by committing an act of domestic abuse, the appropriate portion(s) of the following definition should be given:

“Domestic abuse” means: (i) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members or criminal sexual conduct . . . committed against a minor family or household member by an adult family or household member.

M.S.A. § 518B.01, subd. 2(b) of the statute defines “family or household members.”

In a prosecution for the offense of violation of an order for protection, it should be noted that M.S.A. § 634.20 provides:

Evidence of similar prior conduct by the accused against the victim

of domestic abuse, as defined under Section 518B.01, subdivision 2, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Such evidence is not *Spreigl* evidence and is not subject to the *Spreigl* standard that such evidence be admitted only if the State's other evidence is weak or inadequate. See *State v. Bell*, 703 N.W.2d 858 (Minn. App. 2005); *State v. Kanninen*, 367 N.W.2d 104 (Minn. App. 1985); *State v. Williams*, 363 N.W.2d 911 (Minn. App. 1985).

Under M.S.A. § 634.20, evidence of similar prior conduct is not *Spreigl* evidence and is not subject to an independent *Spreigl* analysis. In *State v. Bell*, 719 N.W.2d 635 (Minn. 2006), a burglary prosecution in which the defendant's former girlfriend was the victim, the Supreme Court held that Minn. Stat. § 634.20 did not require the trial court to do an independent analysis of the State's need for the evidence before admitting the defendant's two prior violations of an order for protection which had barred the defendant from having contact with his former girlfriend.

In *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004) the Supreme Court held that M.S.A. § 634.20, the domestic abuse statute, did not violate the Separation of Powers Doctrine by allowing admission of similar prior conduct without requiring that the prior incident be proven by clear and convincing evidence (as required by the evidentiary rule governing admission of prior bad acts). Evidence of prior domestic violence is conceptually distinct from evidence of prior bad acts to show identity, modus operandi, intent or opportunity, because domestic abuse often involves the same victim and is offered to show the relationship between the defendant and the victim. The Committee believes that neither a cautionary instruction nor a final instruction on the receipt of testimony of prior bad acts needs to be given (see CRIMJIG 2.01 and 3.16) in such a case.

## CRIMJIG 13.57

### STALKING CRIME—DEFINED

Under Minnesota law, whoever

[1] directly or indirectly, or through third parties, manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act

[2] follows, monitors, or pursues another, whether in person or through any available technological or other means

[3] returns to the property of another if the defendant is without claim of right to the property or consent of one with authority to consent

[4] repeatedly makes telephone calls, send text messages, or induces another to make telephone calls to the defendant, whether or not conversation ensues

[5] makes or causes the telephone of another repeatedly or continuously to ring

[6] repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, packages, through assistive devices for the visually or hearing impaired, or any communication made through any available technologies or other objects

is guilty of a crime.

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#### COMMENT

M.S.A. § 609.749.



**CRIMJIG 13.58**

**STALKING CRIME—ELEMENTS**

**The elements of a stalking crime are:**

[1] First, the defendant, directly or indirectly, or through third parties, manifested a purpose or intent to injure the person, property, or rights of another by the commission of the unlawful act of \_\_\_\_\_.<sup>1</sup>

[Here insert the Definition and Elements of the unlawful act (without the venue or guilt provisions) and the Attempt and Conspiracy instructions from Chapter 5 if appropriate.]

[2] First, the defendant followed, monitored or pursued another, whether in person or through any available technological or other means.

[3] First, the defendant returned to the property of another without claim of right to the property or consent of one with authority to consent.

[4] First, the defendant repeatedly made telephone calls, sent text messages, or induced another to make telephone calls to the defendant, whether or not conversation ensued.

[5] First, the defendant made or caused the telephone of another repeatedly or continuously to ring.

[6] First, the defendant repeatedly mailed or delivered or caused the delivery by any means, including electronically, of letters, telegrams, packages, through assistive devices for people with vision impairments or hearing loss, or any communication made through any available technologies, or other objects.

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**13.58**

<sup>1</sup>In order to be convicted of a violation of the stalking statute under the terms of M.S.A. § 609.749, subd.

2(1), the defendant's conduct must include an unlawful act independent of M.S.A. § 609.749, subd. 1.

Second, the defendant knew or had reason to know that the conduct would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated. The State is not required to prove that the defendant intended to cause such a reaction by \_\_\_\_\_.

Third, \_\_\_\_\_ felt frightened, threatened, oppressed, persecuted, or intimidated.

[Additional Elements — add those that apply]

[(Insert Element Number), the defendant committed the act(s) because of \_\_\_\_\_'s (or another's) actual or perceived race, color, religion, sex, sexual orientation, disability, age, or national origin.]

[(Insert Element Number), the defendant committed the offense by falsely impersonating another.]

[(Insert Element Number), the defendant possessed a dangerous weapon at the time of the offense. "A dangerous weapon" means any firearm, whether loaded or unloaded, any device designed as a weapon and capable of producing death or great bodily harm, or any combustible or flammable liquid or other device or instrumentality that in the manner it is used or intended to be used is calculated to produce death or great bodily harm. "Great bodily harm" means bodily harm that creates a high probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body, or other serious bodily harm.]

[(Insert Element Number), the defendant harassed another with intent to influence or otherwise tamper with a juror or judicial proceeding, or with intent to retaliate against a (judicial officer) (prosecutor) (defense attorney) (officer of the court) because of that person's performance of official duties in connection with a judicial proceeding.]

[(Insert Element Number), \_\_\_\_\_ was under the age of eighteen (18) and the defendant was more than 36 months older than \_\_\_\_\_.]



[(Insert Element Number), \_\_\_\_ was under the age of eighteen (18) and the defendant was more than 36 months older than \_\_\_\_.

(Insert Element Number), defendant's act was committed with sexual or aggressive intent.]

[(Insert Element Number), the defendant's act occurred within ten (10) years after having been discharged from a (sentence) (disposition) for a previous (conviction) (adjudication) for a qualified domestic violence-related offense.]<sup>2</sup>

[(Insert Element Number), the defendant's act occurred within ten (10) years of the first of two or more qualified domestic violence-related offense<sup>3</sup> (convictions) (prior adjudications of delinquency).]

[Fourth] [Insert Element Number], the defendant's act took place in \_\_\_\_\_ County on (or about) \_\_\_\_\_.]

[Fourth] [Insert Element Number], (the call was (made) (or) (received)) ((the defendant) (or) (the victim resides)) (the jurisdiction of the victim's designated address is) (any letter, telegram, message, package or other object was (sent) (or) (received)) in \_\_\_\_\_ County on (or about) \_\_\_\_\_.]

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

In order to be convicted of a violation of the stalking statute under the terms of M.S.A. § 609.749, subd. 2(1), the defendant's conduct must include an unlawful act independent of M.S.A. § 609.749, subd. 1. See *State v. Pegelow*, 809 NW2d 245, (Minn. App. 2012)

In *State v. Collins*, 580 N.W.2d 36 (Minn. App. 1998), the Court of

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<sup>2</sup>See M.S.A. § 609.02, subd. 16, for list of qualified domestic violence-related offenses.

<sup>3</sup>See M.S.A. § 609.02, subd. 16, for list of qualified domestic violence-related offenses.



Appeals held that the word “repeatedly” in the harassment statute means more than once.

**CRIMJIG 13.59****PATTERN OF STALKING CONDUCT—DEFINED**

Under Minnesota law, whoever engages in a pattern of stalking conduct with respect to a single victim or one or more members of a single household in a manner the defendant knows or has reason to know would cause the victim under the circumstances to feel terrorized or to fear bodily harm, and which causes this reaction on the part of the victim, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.749, subd. 5.

**CRIMJIG 13.60****PATTERN OF STALKING CONDUCT—ELEMENTS**

The elements of a pattern of stalking conduct are:

First, the defendant engaged in a pattern of stalking conduct. A pattern of stalking conduct means two or more criminal acts<sup>1</sup> within a five-year period.

Second, the defendant engaged in this conduct with respect to (\_\_\_\_\_) (a single victim) (one or more members of a single household<sup>2</sup>).

Third, the defendant knew or had reason to know that (\_\_\_\_\_) (the victim) would feel terrorized or fear bodily harm. "To terrorize" means to cause extreme fear by use of violence or threats.

Fourth, (\_\_\_\_\_) (the victim) felt terrorized or feared bodily harm as a result of the defendant's conduct.

[Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.]

[Fifth, an element of the offense took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.]

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

As indicated in the instructions, the state must prove a pattern of stalking conduct by proving two or more criminal acts within a five year period. The state seeks to meet this element by proving the criminal acts of \_\_\_\_\_ which occurred on \_\_\_\_\_

**13.60**

<sup>1</sup>Violations listed in M.S.A. § 609.749, subd. 5. The trial judge should instruct the jury further on the

definition and the elements of the particular crimes alleged.

<sup>2</sup>See M.S.A. § 518B.01, subd. 2(b) for definition of household member.



\_\_\_\_\_ and \_\_\_\_\_ which occurred on \_\_\_\_\_. I will now instruct you on the elements of those crimes (insert appropriate definition and elements of underlying crimes).

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COMMENT

See Comments to CRIMJIG 11.15 for discussion of “pattern” behavior.

The definition of “to terrorize” comes from *State v. Franks*, 765 N.W.2d 68 (Minn. 2009). See also *State v. Shweppe*, 237 N.W.2d 609 (Minn. 1975).

The Supreme Court has held that while the state must prove a “past pattern” beyond a reasonable doubt, it is not required to prove each separate act beyond a reasonable doubt. *State v. Manley*, 658 N.W.2d 550 (Minn. 2003), reinstated by order June 23, 2003 C8-01-1833 (domestic abuse murder); *State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002) (child abuse murder). Both cases rely on *State v. Cross*, 577 N.W.2d 721 (Minn. 1998), which holds that it is the pattern, not the individual acts making up the pattern, that must be proven beyond a reasonable doubt.

The Court of Appeals held, in *State v. Stillday*, 646 N.W.2d 551 (Minn. App. 2002) that defendant’s pretrial offer to stipulate to prior conviction of terroristic threats did not eliminate the state’s right to offer evidence on the subject, especially where the evidence has relevance beyond the stipulation. The district court has discretion to permit the state to present evidence of the underlying facts.

In *State v. Richardson*, 633 N.W.2d 879 (Minn. App. 2001) the Court of Appeals indicated that the jury instructions for a pattern of harassing conduct must include the elements of the offense and define the underlying criminal acts that constitute the pattern, but need not link the specific predicate acts to each separate pattern of harassment count. The Court further indicated that M.S.A. § 609.749, subd. 5, does not limit the manner in which the state can charge multiple occurrences of a pattern of harassment offense, including using the same occurrence of a criminal act as a predicate act for multiple counts of pattern harassment.

In *State v. Mullen*, 577 N.W.2d 505 (Minn. 1998), the Supreme Court held specific intent was not an element of this crime.

**CRIMJIG 13.61****OBSCENE OR HARASSING TELEPHONE CALLS—  
DEFINED**

Under Minnesota law, whoever, [by means of a telephone, makes] [knowingly permits any telephone under (his) (her) control to be used for making]

[1] any comment, request, suggestion, or proposal that is obscene, lewd, or lascivious,

[2] repeated telephone calls, whether or not conversation ensues, with intent to abuse, disturb, or cause distress to any person at the called number,

[3] makes or causes the telephone of another repeatedly or continuously to ring, with intent to abuse, disturb, or cause distress in any person at the called number,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.79, subd. 1.

**CRIMJIG 13.62****OBSCENE TELEPHONE CALLS—ELEMENTS**

The elements of obscene telephone calls are:

First, the defendant (made) (knowingly permitted a telephone under (his) (her) control to be used for making) a telephone call.

Second, such telephone call contained a comment, request, suggestion, or proposal that was obscene, lewd, or lascivious.

Third, the [phone call was (made) (received) on (or about) \_\_\_\_\_ in \_\_\_\_\_ County] [the (defendant) (victim) resides in \_\_\_\_\_ County and the phone call was placed on or about \_\_\_\_\_.]

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

In determining the standard for defining obscenity in the context of telephone conversations, many courts have rejected the Supreme Court's standards used in the literature and theater contexts. The courts have generally applied the test of the normal, everyday meaning of the word "obscene." Thus, such epithets as "whore," "prostitute," and "son of a bitch" have been held to constitute obscenities. *Baker v. State*, 494 P.2d 68 (Ariz. 1972); *People v. Cirruzzo*, 53 Misc.2d 995, 281 N.Y.S.2d 562 (1967); *State v. Crelly*, 313 N.W.2d 455 (S.D.1981).

For a general discussion on violations of this nature, see the annotation at 95 A.L.R.3d 411, "Validity, Construction, and Application of State Criminal Statute Forbidding Use of Telephone to Annoy or Harass."



**CRIMJIG 13.63****HARASSING TELEPHONE CALLS—ELEMENTS**

The elements of harassing telephone calls are:

[1] First, the defendant repeatedly made telephone calls, whether or not conversation ensued.

[2] First, the defendant made or caused the telephone of another to repeatedly or continuously ring.

[3] First, the defendant, having control of a telephone, knowingly permitted it to be used by another to (repeatedly make telephone calls, whether or not conversation ensued) (make the telephone of another to repeatedly or continuously ring).

Second, the defendant (intended) (knowingly permitted the telephone to be used by another) to abuse, disturb, or cause distress to a person at the called number.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: Did the defendant commit the act because of (\_\_\_\_\_'s) (the person's) actual or perceived (race) (color) (religion) (sex) (sexual orientation) (disability, which is \_\_\_\_\_)<sup>1</sup> (age) (national origin)? You will answer the question "yes" or "no." If you have a reasonable doubt as to the answer, you should answer the question "no."]

## COMMENT

A defendant's intent to harass cannot be based solely upon the effect of the calls on the recipient. *People v. Cooper*, 336 N.E.2d 247 (Ill. 1975); *State v. Patterson*, 534 S.W.2d 847 (Mo. App. 1976). However, a jury can consider the specific circumstances that support a finding of the necessary intent to harass, such as anonymity of the caller, timing of the telephone calls, and an oral representation of a defendant's promise to tie up the complainant's telephone all day. *Kinney v. State*, 404 N.E.2d 49 (Ind.App.1980); *Caldwell v. State*, 337 A.2d 476 (Md. 1975); *State v. Zeit*, 539 P.2d 1130 (Or. 1975).

For a general discussion on violations of this nature, see the annotation at 95 A.L.R.3d 411, "Validity, Construction, and Application of State Criminal Statute Forbidding Use of Telephone to Annoy or Harass."

**CRIMJIG 13.64**

**VIOLATION OF HARASSMENT RESTRAINING  
ORDER—DEFINED**

Under Minnesota law, whoever violates a harassment restraining order and knows of the order is guilty of a crime.

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COMMENT

M.S.A. § 609.748, subd. 6.



**CRIMJIG 13.65****VIOLATION OF HARASSMENT RESTRAINING  
ORDER—ELEMENTS**

The elements of violation of a harassment restraining order are:

First, there was an existing court order restraining defendant from harassing \_\_\_\_\_.

Second, the defendant violated a term or condition of the order.

Third, the defendant knew of the order.

Fourth, the defendant's act<sup>1</sup> took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[If you find the defendant is guilty of a violation of a restraining order, you have (an) additional question(s) to determine, and (it) (they) will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant commit this crime within ten years of conviction for a previous qualified domestic violence-related offense?<sup>2</sup> Did the defendant commit this crime within ten years of the first of defendant's two or more previous qualified domestic violence-related offense<sup>3</sup> [convictions] [or] [adjudications of delinquency]? Did the defendant possess a dangerous weapon while commit-

**13.65**

<sup>1</sup>Note that if the offense arises by way of phone calls or other electronic communication, venue can be had in the county of residence of either the victim or the defendant or from where the phone call or other electronic communication was sent

from or received. M.S. A. § 609.748, subd. 6(e) and (f).

<sup>2</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.

<sup>3</sup>See M.S.A. § 609.02, subd. 16, for the definition of a qualified domestic violence-related offense.

ting this crime? A "dangerous weapon" is anything designed as a weapon and capable of producing death or great bodily harm, or any combustible or flammable liquid<sup>4</sup> or anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm or any fire that is used to produce death or great bodily harm. Did the defendant commit this offense because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age or national origin? Did the defendant commit this offense by falsely impersonating another? Did the defendant commit this offense with an intent to influence or otherwise tamper with a juror or a judicial proceeding or with intent to retaliate against a judicial officer or a prosecutor, defense attorney, or officer of the court because of that person's performance of official duties in connection with a judicial proceeding? Did the defendant commit this offense against a victim under the age of 18 years of age and the defendant is more than 36 months older than the victim? You should answer the questions "yes" or "no." If you have a reasonable doubt as to the answer, you should answer the question "no."]

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#### COMMENT

Because the statute provides that a person who violates M.S.A. 609.748, subd. 1 is subject to the penalties listed in subdivision 2, the Committee is of the opinion the interrogatories relate to sentencing and are therefore proper as part of a *Blakely* sentencing proceeding (See Chapter 8). If the defendant stipulates to a prior conviction, the court should accept that stipulation and remove that element from the jury. *State v. Davidson*, 351 N.W.2d 8 (Minn.1984).

The Court of Appeals has held that the defendant violated the harassment order when defendant instigated contact of a third party with the victim even though the order did not specifically refer to harassment by use of a third-party. *State v. Egge*, 611 N.W.2d 573 (Minn. App. 2000).

See CRIMJIG 13.50 and 13.51.

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<sup>4</sup>A flammable liquid is defined by statute to be: Class I flammable liquids as defined in section 9.108 of the Uni-

form Fire Code, but not intoxicating liquor as defined in M.S.A. § 340.07. M.S.A. § 609.01, subd. 6.

**CRIMJIG 13.66****DEFENSE TO STALKING CRIME**

The defendant asserts a defense to the crime of stalking.

The defendant has been charged with (stalking crimes) (engaging in a pattern of stalking conduct). It is a defense to this charge if the defendant's acts were performed (under the terms of a valid license) (to ensure compliance with court order) (to carry out a specific lawful commercial purpose or employment duty) (and is authorized or required by a valid contract) (and is authorized, required, or protected by state or federal law or the state or federal constitutions).

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in such circumstances and with such authority.

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**COMMENT**

M.S.A. § 609.749, subd. 7.

The statute provides that conduct is not criminal if it is performed under the provisions of this subdivision. The Committee is of the opinion that if the defendant raises this issue, it is the burden of the State to prove beyond a reasonable doubt the absence of this defense. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975).



**CRIMJIG 13.67**

**MISTREATMENT OF PERSONS CONFINED—  
CHILD—DEFINED**

Under Minnesota law,

[1] any (operator) (employee) (volunteer worker) at any facility who intentionally (neglects) (physically abuses) (sexually abuses) any child in the care of that facility,

[2] any operator of a facility who knowingly permits conditions to exist which result in (neglect) (physical abuse) (sexual abuse) of a child in the care of that facility,

is guilty of a crime.

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COMMENT

M.S.A. § 626.556.

**CRIMJIG 13.68****MISTREATMENT OF PERSONS CONFINED—  
CHILD—ELEMENTS**

The elements of the crime are:

First, the defendant was (a) (an) (operator) (employee) (volunteer worker) at \_\_\_\_\_ (place of care).

[1] Second, the defendant intentionally (neglected) (physically abused) (sexually abused) \_\_\_\_\_ (a child).

[2] Second, the defendant knowingly permitted conditions to exist that resulted in (neglect) (physical abuse) (sexual abuse) of \_\_\_\_\_<sup>1</sup> (a child).

Third, \_\_\_\_\_ (the child) was in the care of \_\_\_\_\_ (a place of care).

Fourth, \_\_\_\_\_ was a facility.<sup>2</sup> [You are instructed that \_\_\_\_\_ (the place of care) was a facility.<sup>3</sup>]

Fifth, \_\_\_\_\_ (the child) was under eighteen years of age.

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 626.556, subd. 12.

For definitions, see the following sections: "Sexual abuse," M.S.A.

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**13.68**

<sup>1</sup>To use this element, the defendant must be alleged to be an operator.

<sup>2</sup>See M.S.A. § 626.556, subd.

2(h)(i) for definition of facility.

<sup>3</sup>In the fourth element, a place of care is a "facility" as a matter of law if it is licensed.

§ 626.556, subd. 2(a); “Neglect,” M.S.A. § 626.556, subd. 2(c); “Physical abuse,” M.S.A. § 626.556, subd. 2(d).



**CRIMJIG 13.69****MISTREATMENT OF RESIDENTS OR PATIENTS—  
DEFINED**

Under Minnesota law, whoever, being in charge of or employed by a licensed (hospital) (sanatorium) (rest home) (nursing home) (boarding home) (institution for the hospitalization or care of human beings), intentionally abuses, ill-treats, or culpably neglects any patient or resident therein to his or her physical detriment, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.231; §§ 144.50–144.58; § 144A.02.

**CRIMJIG 13.70****MISTREATMENT OF RESIDENTS OR PATIENTS—  
ELEMENTS**

The elements of the crime are:

First, the defendant was (in charge of) (employed by) \_\_\_\_\_, which is a licensed \_\_\_\_\_.<sup>1</sup>

Second, \_\_\_\_\_ was a resident or patient in \_\_\_\_\_.<sup>2</sup>

Third, the defendant intentionally abused or ill-treated, or culpably neglected \_\_\_\_\_. "Culpable negligence" is the creation of an unreasonable risk, consciously taking a chance of causing death or great bodily harm.

Fourth, \_\_\_\_\_ suffered a physical detriment because of the defendant's conduct.

Fifth, the defendant's conduct took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.231.

The definition of "culpable negligence" is drawn from *State v. Swanson*, 307 Minn. 412, 240 N.W.2d 822 (1976); *State v. Beilke*, 267 Minn. 526, 127 N.W.2d 516 (1964); *State v. Bolsinger*, 221 Minn. 154, 21 N.W.2d 480 (1946).

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**13.70**

<sup>1</sup>See M.S.A. 609.231 for the statutes defining a facility required to be licensed.

<sup>2</sup>A facility required to be licensed as required by M.S.A. § 609.231 and the statutes referenced therein.

**CRIMJIG 13.71****SEXUAL ABUSE—(RESIDENT) (PATIENT)  
(CLIENT)—DEFINED**

Under Minnesota law, whoever is a caregiver, facility staff person, or person providing services in a facility, who engages in sexual contact or sexual penetration with a resident, patient, or client of a facility, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2325, subd. 1(b).



**CRIMJIG 13.72****SEXUAL ABUSE—(RESIDENT) (PATIENT)  
(CLIENT)—ELEMENTS**

The elements of sexual abuse of a vulnerable adult are:

First, the defendant was a caregiver, facility staff person, or a person providing services in a facility. A “caregiver” is an individual or facility having responsibility for the care of a vulnerable adult as the result of a family relationship, or having assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract or by agreement. A facility is \_\_\_\_\_.<sup>1</sup>

Second, \_\_\_\_\_ was a resident, patient, or client of the facility.

Third, the defendant engaged in sexual penetration or sexual contact \_\_\_\_\_.

[1] Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.

[2] Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue, or lips of another person.

[3] Cunnilingus constitutes sexual penetration if there is any contact between the female genital opening of one person and the mouth, tongue, or lips of another person.

[4] Anal intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis of one person into the anal opening of another person.

[5] Any intrusion, however slight, of any part of one person’s body (or of any object used by one person) into

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13.72

for further definition of a facility.

<sup>1</sup>See M.S.A. § 609.232, subd. 3,

the genital or anal openings of another person's body constitutes sexual penetration.

Emission of semen is not necessary to accomplish sexual penetration.

"Sexual contact" means the defendant intentionally touched \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts, or effected the touching of \_\_\_\_\_'s intimate parts or the clothing over the immediate area of \_\_\_\_\_'s intimate parts by coercion or the use of a position of authority. The intimate parts of the body include the genital area, groin, inner thigh, buttocks, and breast.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.341 defines sexual penetration and sexual contact.

In *State v. Rucker*, 752 N.W.2d 558 (Minn. App. 2008) the Court of Appeals was asked to resolve a question on the meaning of "position of authority." In this case, defendant was facilitator for a program to provide students with academic help. He used the program to make initial contact with his victims. Although none of the criminal sexual contacts occurred during program time, the Court found that using his position within the program to facilitate contact with victims after hours was use of a "position of authority." The Court, citing *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1998) indicated that the "position of authority" language of the statute is "broadly defined."

The Court of Appeals, in *State v. Mogler*, 719 N.W.2d 201 (Minn. App. 2006), held, against a vagueness challenge, that the statutory definition of "position of authority" included a person who was charged with any duty or responsibility for the health, welfare, or supervision of a child, and thus the statute provided notice that an on-duty police officer had a duty of responsibility for the welfare of a 17-year-old child that placed the officer in a position of authority over the child.

In *State v. Fero*, 747 N.W.2d 596 (Minn. App. 2008), the Court of

Appeals concluded that where a position of authority is the result of an employment relationship, that position of authority may apply even when the sexual misconduct occurs outside of work hours and off work premises.



**CRIMJIG 13.73****CRIMINAL ABUSE—VULNERABLE ADULT—  
DEFINED**

Under Minnesota law, a caregiver who, with intent to produce physical or mental pain or injury to a vulnerable adult, subjects the vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.2325, subd. 1(a).

**CRIMJIG 13.74****CRIMINAL ABUSE—VULNERABLE ADULT—  
ELEMENTS**

The elements of criminal abuse of a vulnerable adult are:

First, the defendant was a caregiver. A “caregiver” is an individual or facility having responsibility for the care of a vulnerable adult as the result of a family relationship, or having assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract or by agreement. [A facility is \_\_\_\_\_.<sup>1</sup>]

Second, \_\_\_\_\_ was a vulnerable adult. A “vulnerable adult” is a person who is 18 years of age or older who (is a resident inpatient of a facility) (receives services at or from a facility required to be licensed by the Commissioner of Human Services to serve adults, except that a person who receives outpatient services for treatment of chemical dependency or mental illness or who has been committed as a sexual psychopathic personality or sexually dangerous person is not considered a vulnerable adult unless that person possesses physical or mental infirmity or there is physical or mental emotional dysfunction that impairs the person’s ability to provide adequately for his or her own care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment) (receives services from a home care provider licensed by the Commissioner of Human Services or from a person or organization that exclusively offers, provides, or arranges for personal care assistance services) (regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction that impairs the person’s ability to provide adequately for his or her care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the

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13.74

for further definition of a facility.

<sup>1</sup>See M.S.A. § 609.232, subd. 3,

dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment).

Third, the defendant acted with intent to produce physical or mental pain or injury to \_\_\_\_\_.

Fourth, the defendant subjected \_\_\_\_\_ to aversive or deprivation procedure,<sup>2</sup> unreasonable confinement, or involuntary seclusion.

This element is not satisfied if the defendant's act was therapeutic conduct. "Therapeutic conduct" means the provision of program services, health care, or other personal care services done in good faith in the interests of the vulnerable adult by an individual, facility, or employee, by a person providing services in a facility under the rights, privileges, and responsibilities conferred by state license, certification, or registration, or by a caregiver.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[If you find the defendant is guilty, you have an additional issue to determine that will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did the defendant's act result in the death of \_\_\_\_\_? Did the defendant's act result in great bodily harm to \_\_\_\_\_? "Great bodily harm" means bodily harm that creates a high probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body or other serious bodily harm. Did the defendant's act result in substantial bodily harm or the risk of death to \_\_\_\_\_? "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, causes a

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<sup>2</sup>See M.S.A. § 245.825 and Minnesota Rules, parts 9525.2700 to 9525.2810, for definition of aversive or deprivation procedures.



temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member. You will answer (the) (each) question "yes" or "no." If you have a reasonable doubt as to the answer, you should answer "no."]

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COMMENT

*See M.S.A. § 609.232, subd. 3, for further definition of a facility.*

**CRIMJIG 13.75****CRIMINAL NEGLECT—VULNERABLE ADULT—  
DEFINED**

Under Minnesota law, whoever is a caregiver or operator and intentionally neglects a vulnerable adult, or knowingly permits conditions to exist that result in the abuse or neglect of a vulnerable adult, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.233.

**CRIMJIG 13.76****CRIMINAL NEGLECT—VULNERABLE ADULT—  
ELEMENTS**

The elements of criminal neglect of a vulnerable adult are:

First, the defendant was (a caregiver) (operator) with respect to a vulnerable adult. A “caregiver” is an individual or facility having responsibility for the care of a vulnerable adult as the result of a family relationship, or having assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract or by agreement. An “operator” is any person whose duties and responsibilities evidence actual control of administrative activities or authority for the decision making of or by a facility. A facility is \_\_\_\_\_.<sup>1</sup>

Second, \_\_\_\_\_ was a vulnerable adult. A “vulnerable adult” is a person who is 18 years of age or older who (is a resident inpatient of a facility) (receives services at or from a facility required to be licensed by the Commissioner of Human Services to serve adults, except that a person who receives outpatient services for treatment of chemical dependency or mental illness or who has been committed as a sexual psychopathic personality or sexually dangerous person is not considered a vulnerable adult unless that person possesses a physical or mental infirmity or there is physical or mental emotional dysfunction that impairs the person’s ability to provide adequately for his or her own care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment) (receives services from a home care provider licensed by the Commissioner of Human Services or from a person or organization that exclusively offers, provides, or arranges for personal care assistance services) (regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emo-

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13.76

for further definition of a facility.

<sup>1</sup>See M.S.A. § 609.232, subd. 3,



tional dysfunction that impairs the person's ability to provide adequately for his or her care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment).

Third, the defendant knowingly neglected \_\_\_\_\_ or knowingly permitted conditions to exist that resulted in the abuse or neglect of \_\_\_\_\_. "Abuse" means \_\_\_\_\_.<sup>2</sup> "Neglect" means a failure to provide a vulnerable adult with necessary food, clothing, shelter, health care, or supervision.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

See M.S.A. § 609.232, subd. 3, for further definition of a facility.

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<sup>2</sup>See M.S.A. § 626.5572, subd. 2 for the definition of abuse.

**CRIMJIG 13.77****FINANCIAL EXPLOITATION—VULNERABLE  
ADULTS—DEFINED**

Under Minnesota law, whoever, in breach of a fiduciary obligation recognized elsewhere in law including pertinent regulations, contractual obligations, and documented consent by a competent person, where the obligations of a responsible party are defined by law, intentionally

[1] fails to use the real or personal property or other financial resources of a vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct, or supervision for the vulnerable adult in breach of a fiduciary obligation recognized in the law,

[2] uses, manages, or takes either temporarily or permanently the real or personal property or other financial resources of a vulnerable adult, whether held in the name of the vulnerable adult or a third party, for the benefit of someone other than the vulnerable adult

[3] deprives a vulnerable adult, either temporarily or permanently, of the vulnerable adult's real or personal property or other financial resources, whether held in the name of the vulnerable adult or a third party, for the benefit of someone other than the vulnerable adult

Under Minnesota law whoever:

[4] in the absence of legal authority, acquires possession or control of an interest in real or personal property or other financial resources of a vulnerable adult, whether held in the name of the vulnerable adult or a third party, through the use of undue influence, harassment, or duress,

[5] in the absence of legal authority, forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another,

**[6] in the absence of legal authority, establishes a relationship with a fiduciary obligation to a vulnerable adult by use of undue influence, harassment, duress, force, compulsion, coercion, or other enticement**

**is guilty of a crime.**

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**COMMENT**

**M.S.A. § 609.2335.**



**CRIMJIG 13.78****FINANCIAL EXPLOITATION—VULNERABLE  
ADULTS—ELEMENTS**

The elements of exploitation of a vulnerable adult are:

First, \_\_\_\_\_ was a vulnerable adult. A “vulnerable adult” is a person who is 18 years of age or older who (is a resident inpatient of a facility) (receives services at or from a facility required to be licensed by the Commissioner of Human Services to serve adults, except that a person who receives outpatient services for treatment of chemical dependency or mental illness or who has been committed as a sexual psychopathic personality or sexually dangerous person is not considered a vulnerable adult unless that person possesses a physical or mental infirmity or there is physical or mental emotional dysfunction that impairs the person’s ability to provide adequately for his or her own care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment) (receives services from a home care provider licensed by the Commissioner of Human Services or from a person or organization that exclusively offers, provides, or arranges for personal care assistance services) (regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction that impairs the person’s ability to provide adequately for his or her care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment).

Second, the defendant knew or had reason to know \_\_\_\_\_ (the vulnerable adult) was vulnerable.

[1] Third, the defendant was in a fiduciary relationship with \_\_\_\_\_ (the vulnerable adult). A fiduciary relationship exists when a person, referred to as the fiduciary, holds a superior position of authority and control over the property of

another person referred to as the principal, and in whom the principal places a high level of trust and confidence.

[A power of attorney creates a fiduciary relationship and requires that the fiduciary exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and make the interests of the principal as the fiduciary's highest concern to the extent granted by the power of attorney.]

[Existence of a joint account alone does not determine whether a fiduciary relationship exists. You must also consider: (1) the legal, familial, or personal relationship between the parties; (2) the capacity or sophistication of each party and in their relationship to each other; (3) who contributed the funds to the joint account and in what ratio; and (4) the parties' understanding of their respective roles and responsibilities within the relationship and (5) the parties' intent in creating the relationship.]

Fourth, defendant breached a fiduciary obligation recognized in the law and arising from the fiduciary relationship. The fiduciary obligation is recognized in law if it arises from pertinent regulations, contractual obligations, documented consent by a competent person, or the obligations under a nursing home admission contract, or other binding legal action.

Fifth, the defendant intentionally failed to use the real or personal property or other financial resources of \_\_\_\_\_ to provide food, clothing, shelter, health care, therapeutic conduct, or supervision for \_\_\_\_\_ in breach of that fiduciary obligation.

[2] Third, the defendant was in a fiduciary relationship with \_\_\_\_\_ (the vulnerable adult). A fiduciary relationship exists when a person, referred to as the fiduciary, holds a superior position of authority and control over the property of another person referred to as the principal, and in whom the principal places a high level of trust and confidence.

[A power of attorney creates a fiduciary relationship and requires that the fiduciary exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs



and make the interests of the principal as the fiduciary's highest concern to the extent granted by the power of attorney.]

[Existence of a joint account alone does not determine whether a fiduciary relationship exists. You must also consider: (1) the legal, familial, or personal relationship between the parties; (2) the capacity or sophistication of each party and in their relationship to each other; (3) who contributed the funds to the joint account and in what ratio; and (4) the parties' understanding of their respective roles and responsibilities within the relationship and (5) the parties' intent in creating the relationship.]

Fourth, defendant breached a fiduciary obligation recognized in the law and arising from the fiduciary relationship. The fiduciary obligation is recognized in law if it arises from pertinent regulations, contractual obligations, documented consent by a competent person, or the obligations under a nursing home admission contract, or other binding legal action.

Fifth, the defendant used, managed, or took either temporarily or permanently the real or personal property or other financial resources of (\_\_\_\_\_) (the vulnerable adult), whether held in the name of (\_\_\_\_\_) (the vulnerable adult) or a third party, for the benefit of someone other than the vulnerable adult.

[3] Third, the defendant was in a fiduciary relationship with \_\_\_\_\_ (the vulnerable adult). A fiduciary relationship exists when a person, referred to as the fiduciary, holds a superior position of authority and control over the property of another person referred to as the principal, and in whom the principal places a high level of trust and confidence.

[A power of attorney creates a fiduciary relationship and requires that the fiduciary exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and make the interests of the principal as the fiduciary's highest concern to the extent granted by the power of attorney.]

[Existence of a joint account alone does not determine whether a fiduciary relationship exists. You must also consider:



(1) the legal, familial, or personal relationship between the parties; (2) the capacity or sophistication of each party and in their relationship to each other; (3) who contributed the funds to the joint account and in what ratio; and (4) the parties' understanding of their respective roles and responsibilities within the relationship and (5) the parties' intent in creating the relationship.]

Fourth, defendant breached a fiduciary obligation recognized in the law and arising from the fiduciary relationship. The fiduciary obligation is recognized in law if it arises from pertinent regulations, contractual obligations, documented consent by a competent person, or the obligations under a nursing home admission contract, or other binding legal action

Fifth, the defendant deprived, either temporarily or permanently, (\_\_\_\_\_) (the vulnerable adult) of (his) (her) (the vulnerable adult's) real or personal property or other financial resources, whether held in the name of the vulnerable adult or a third party, for the benefit of someone other than the vulnerable adult.

[4] Third, the defendant acquired possession or control of an interest in the real or personal property or other financial resources of (\_\_\_\_\_) (the vulnerable adult), whether held in the name of (\_\_\_\_\_) (the vulnerable adult) or a third party, through the use of undue influence, harassment, duress, or force.

Fourth, the defendant acted in the absence of legal authority.

[5] Third, the defendant compelled, coerced, or enticed \_\_\_\_\_ against \_\_\_\_\_'s (the vulnerable adult's) will to perform services for the profit or advantage of another.

Fourth, the defendant acted in the absence of legal authority.

[6] Third, the defendant established a relationship with a fiduciary obligation to a vulnerable adult by use of undue influence, harassment, duress, force, compulsion, coercion, or other enticement.

Fourth, the defendant acted in the absence of legal authority.

[Fifth] [Sixth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[For interrogatories relating to the value of the property, see CRIMJIGs 16.76 through 16.83.]

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COMMENT

See M.S.A. § 609.232, subd. 3, for further definition of a facility.

If the prosecution is for a violation of M.S.A. § 609.2335, subd. 1(1) or (2)(i), the defendant may be sentenced as provided in M.S.A. § 609.52, subd. 3. In such a case, an interrogatory or interrogatories consistent with CRIMJIGs 16.76 through 16.83 should be used.

The requirements for the fiduciary relationship and obligation are drawn from *State v. Campbell*, 756 N.W.2d 263 (Minn. App. 2008). The case takes a more expansive view of what may give rise to a fiduciary obligation than the language of the statute. However, the language of the statute, which uses the term “including” does not exclude other situations beyond those listed in the statute. The Committee strongly recommends a review of this case prior to drafting instructions.

**CRIMJIG 13.79****VULNERABLE ADULT CRIMES—DEFENSE OF  
THERAPEUTIC CONDUCT**

The laws of Minnesota provide that it is a defense to a prosecution for (abuse) (neglect) of a vulnerable adult if the vulnerable adult, or person with authority to make health care decisions for the adult, refused consent or withdrew consent, consistent with that authority and within the boundary of reasonable medical practice, to any therapeutic conduct, including any care, service, or procedure to diagnose, maintain, or treat the physical or mental condition of the vulnerable adult or, where permitted under law, to provide nutrition and hydration, parenterally or through intubation. The burden of proof is on the State to prove beyond a reasonable doubt that the defendant did not act under this authority.

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**COMMENT**

M.S.A. §§ 609.2325, subd. 2, and 609.233, subd. 2.



**CRIMJIG 13.80****VULNERABLE ADULT CRIMES—DEFENSE OF  
SPIRITUAL MEANS OR PRAYER**

It is a defense to a prosecution for (abuse) (neglect) of a vulnerable adult if the vulnerable adult, a person with authority to make health care decisions for the vulnerable adult, or a caregiver in good faith, selected and depended upon spiritual means or prayer for treatment or care of a disease or remedial care of a vulnerable adult in lieu of medical care, provided that this is consistent with the prior practice or belief of the vulnerable adult or with the expressed intentions of the vulnerable adult. The burden of proof is on the State to prove beyond a reasonable doubt that the defendant did not act under this authority.

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**COMMENT**

M.S.A. §§ 609.2325, subd. 2(2), and 609.233, subd. 2(2).

**CRIMJIG 13.81****VULNERABLE ADULT SEXUAL ABUSE—DEFENSE  
OF CONSENT**

It is a defense to a prosecution for sexual abuse of a vulnerable adult if the vulnerable adult is one who was not impaired in judgment or capacity by mental or emotional dysfunction or undue influence and engaged in consensual sexual contact with the defendant when a consensual sexual personal relationship existed prior to the caregiving relationship or with a personal care attendant regardless of whether the consensual sexual personal relationship existed prior to the caregiving relationship. [The burden of proof is upon the State to prove beyond a reasonable doubt the lack of \_\_\_\_\_'s consent to the sexual contact.] [A vulnerable adult who is impaired in judgment or capacity by mental or emotional dysfunction or undue influence may not give consent for the defendant to engage in sexual contact.]

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**COMMENT**

M.S.A. §§ 609.2325, subd. 2(3) and 609.233, subd. 2(3).

**CRIMJIG 13.82****UNREASONABLE RESTRAINT OF CHILD—  
DEFINED**

Under Minnesota law, a parent, legal guardian, or caretaker who intentionally subjects a child under the age of 18 years to unreasonable physical confinement or restraint by means including, but not limited to, tying, locking, caging, or chaining for a prolonged period of time and in a cruel manner that is excessive under the circumstances, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.255, subd. 3.



**CRIMJIG 13.83****UNREASONABLE RESTRAINT OF A CHILD—  
ELEMENTS**

The elements of unreasonable restraint of a child are:

First, the defendant intentionally confined or restrained \_\_\_\_\_. To confine or restrain a person is to deprive (him) (her) of (his) (her) freedom to go where (he) (she) pleases and is lawfully entitled to go, or to leave the place where (he) (she) is.

Second, such restraint or confinement was unreasonable. A restraint or confinement is unreasonable if it is by means that include, but are not limited to, tying, locking, caging, or chaining for a prolonged period of time, and in a cruel manner that is excessive under the circumstances. [It is recommended that CRIMJIG 13.86, permitted use of reasonable force toward a child, be given at this time.]

Third, the defendant's relationship to \_\_\_\_\_ was that of (parent) (legal guardian) (caretaker). [A parent may be either biological or adoptive.] [A legal guardian is one who has been judicially appointed.] [The term "caretaker" means an individual who has responsibility for the care of a child as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of the child.]

Fourth, \_\_\_\_\_ was a child who had not reached (his) (her) eighteenth birthday at the time of the defendant's act.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[If you find the defendant is guilty, there (is an) (are) additional issue(s) that you must determine. The question(s) (is) (are):

Did the confinement or restraint result in substantial bodily harm to the child? "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member. Did the confinement or restraint result in demonstrable bodily harm to the child? "Demonstrable bodily harm" means bodily harm that is capable of being perceived by a person other than the victim.

You will answer the question(s) "yes" or "no." If you have a reasonable doubt as to the answer to the question, you should answer "no."]

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COMMENT

M.S.A. § 609.255, subd. 3.

**CRIMJIG 13.84****MALICIOUS PUNISHMENT OF A CHILD—DEFINED**

Under Minnesota law, a parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.377.



**CRIMJIG 13.85****MALICIOUS PUNISHMENT OF A CHILD—  
ELEMENTS**

The elements of malicious punishment of a child are:

First, the defendant intentionally committed an act or series of acts with respect to a child evidencing unreasonable force or cruel discipline that is excessive under the circumstances.

Unreasonable force is such force used in the course of punishment as would appear to a reasonable person to be excessive under the circumstances. The term "cruelty" may be taken as having its common, ordinary meaning. [It is recommended that CRIMJIG 13.86, permitted use of reasonable force toward a child, be used at this time.]

Second, the defendant's relationship to \_\_\_\_\_ was that of (parent) (legal guardian) (caretaker). [A parent may be either biological or adoptive.] [A legal guardian is one who has been judicially appointed.] [The term "caretaker" means an individual who has responsibility for the care of a child as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of the child.]

Third, \_\_\_\_\_ was a child who had not reached (his) (her) eighteenth birthday at the time of the defendant's act.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, there (are) (is) (an) additional issue(s) that you must determine. The question(s) will be submitted to you on the verdict form. The State has the burden of proving the nature of the harm to \_\_\_\_\_ beyond a reasonable doubt. The question(s) (is) (are):

Did \_\_\_\_\_ sustain great bodily harm? “Great bodily harm” means bodily injury that creates a high probability of death, causes serious permanent disfigurements, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

Did \_\_\_\_\_ sustain substantial bodily harm? “Substantial bodily harm” means bodily injury that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.

Did \_\_\_\_\_ sustain less than substantial bodily harm?

Was \_\_\_\_\_ under the age of four years? Did \_\_\_\_\_ sustain bodily harm to the head, eyes, or neck, or otherwise suffer multiple bruises to the body? “Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.

Did the defendant’s act take place within ten years of a previous qualified domestic violence-related offense<sup>1</sup> [conviction][or][adjudication of delinquency]?

You should answer each question “yes” or “no.” If you have a reasonable doubt as to the answer, you should answer the question “no.”

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#### COMMENT

M.S.A. § 609.377.

The Court of Appeals, in *State v. Broten*, 836 N.W.2d 573 (Minn. App. 2013) held that the phrase “unreasonable force or cruel discipline” is disjunctive and therefore there is no requirement, under the statute, to prove bodily harm.

Interrogatories to be used will depend on the degree of charges filed against the defendant and submitted to the jury.

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#### 13.85

<sup>1</sup>See M.S.A. § 609.02, subd. 16,

for the definition of a previous qualified domestic violence-related offense.

**CRIMJIG 13.86****PERMITTED USE OF REASONABLE FORCE  
TOWARD A CHILD**

The defendant is not guilty of a crime if the defendant used reasonable force upon or toward \_\_\_\_\_ without the child's consent when circumstances existed, or the defendant reasonably believed circumstances existed, as follows: [when used by a parent, legal guardian, teacher, or other caretaker of a child or pupil in the exercise of lawful authority to restrain or correct the child or pupil] [when used by a teacher or other member of the instructional, support, or supervisory staff of a public or nonpublic school upon or toward a child when necessary to restrain the child from hurting himself or any other person or property].

The burden of proof is on the State to prove beyond a reasonable doubt that such a circumstance did not exist, and that the defendant did not reasonably believe it to exist.

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**COMMENT**

M.S.A. 609.379, subd. 1.

Applicable to M.S.A. §§ 260B.425, 260C.425, 609.255, 609.376, 609.378, and 626.556, subd. 12. *See also* M.S.A. § 609.06, subd. 1(6). Although M.S.A. § 609.379, subd. 1, does not list the defense as available for a violation of M.S.A. § 609.377, the provisions of M.S.A. § 609.06, subd. 1(6) make the defense available.



**CRIMJIG 13.87****NEGLECT OF A CHILD—DEPRIVING OF  
NECESSARY FOOD, ETC.—DEFINED**

Under Minnesota law, a (parent) (legal guardian) (caretaker) who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the (parent) (guardian) (caretaker) is reasonably able to make the necessary provisions, and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.378, subd. 1(a)(1).

**CRIMJIG 13.88****NEGLECT OF A CHILD—DEPRIVING OF  
NECESSARY FOOD, ETC.—ELEMENTS**

The elements of neglect of a child by willfully depriving the child of necessary (food) (clothing) (shelter) (health care) (supervision) are:

First, the defendant willfully deprived \_\_\_\_\_ of necessary (food) (clothing) (shelter) (health care) (supervision appropriate to the child's age), when the defendant was reasonably able to make the necessary provisions. [It is recommended that CRIMJIG 13.101 (defense of good faith reliance on spiritual means or prayer for health care) be given at this time, if applicable.]

Second, such neglect resulted in harm or was likely to cause substantial harm to \_\_\_\_\_'s physical, mental, or emotional health.

There is no precise definition for the term "substantial harm to the child's physical, mental, or emotional health." In determining whether \_\_\_\_\_ suffered physical, mental, or emotional harm, you may consider, but you are not limited to, any evidence showing that any conduct by the defendant has resulted in behavior by \_\_\_\_\_ of a type that would not normally be expected of this child, and that has interfered with the child's normal growth and development. From all of the evidence that you have seen and heard in this case, and using your own good judgment and common sense, you must determine the meaning of the term as it relates to \_\_\_\_\_, and decide whether or not \_\_\_\_\_, as a result of any conduct of the defendant, suffered physical, mental, or emotional harm.

"Substantial physical harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of

any bodily member or organ, or causes a fracture of any bodily member.<sup>1</sup>

Third, the defendant's relationship to \_\_\_\_\_ was that of (parent) (legal guardian) (caretaker). [A parent may be either biological or adoptive.] [A legal guardian is one who has been judicially appointed.] [The term "caretaker" means an individual who has responsibility for the care of a child as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of the child.]

Fourth, \_\_\_\_\_ was a child who had not reached (his) (her) eighteenth birthday at the time of the defendant's act.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty, you have an additional issue to determine, and it will be put to you in the form of a question that will appear on the verdict form. The question is: Did the deprivation result in substantial harm to \_\_\_\_\_'s physical, mental or emotional health? You should answer the question "yes" or "no." If you have a reasonable doubt as to the answer, you should answer the question "no."

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#### COMMENT

For purposes of the first element of this offense, the term "willfully" means "intentionally." The defendant must either have a purpose to do the thing or cause the result specified, or believes that the acts performed, if successful, will cause that result. *State v. Cyrette*, 636 N.W.2d 343 (Minn. App. 2001).

M.S.A. § 609.378, subd. 1(a)(1).

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13.88

<sup>1</sup>Definition of substantial physi-

cal harm is drawn from M.S.A. § 609.02, subd. 7a.



**CRIMJIG 13.89**

**NEGLECT OF A CHILD—PERMITTING  
CONTINUOUS PHYSICAL OR SEXUAL ABUSE—  
DEFINED**

Under Minnesota law, a (parent) (legal guardian) (care-taker) who knowingly permits the continuing physical or sexual abuse of a child is guilty of a crime.

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COMMENT

M.S.A. § 609.378, subd. 1(a)(2).

**CRIMJIG 13.90****NEGLECT OF A CHILD—PERMITTING  
CONTINUOUS PHYSICAL OR SEXUAL ABUSE—  
ELEMENTS**

The elements of neglect of a child by knowingly permitting continuing physical or sexual abuse are:

First, the defendant knowingly permitted the continuing (physical) (sexual) abuse of \_\_\_\_\_. [If the alleged abuse is both physical and sexual, both should be given.] You may consider these terms as having their common, ordinary meanings. [It is recommended that CRIMJIG 13.102 (defense to knowingly permitting continued physical or sexual abuse of a child) be given at this time, if applicable.]

Second, the defendant's relationship to \_\_\_\_\_ was that of (parent) (legal guardian) (caretaker). [A parent may be either biological or adoptive.] [A legal guardian is one who has been judicially appointed.] [The term "caretaker" means an individual who has responsibility for the care of a child as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of the child.]

Third, \_\_\_\_\_ was a child who had not reached (his) (her) eighteenth birthday at the time of the defendant's act.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.378, subd. 1(a)(2).

**CRIMJIG 13.91****CHILD ENDANGERMENT—DEFINED**

Under Minnesota law, whoever is a (parent) (legal guardian) (caretaker) who endangers a child's person or health by intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, emotional, or mental health or to cause the child's death, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.378, subd. 1(b)(1).



**CRIMJIG 13.92****CHILD ENDANGERMENT—ELEMENTS**

The elements of child endangerment are:

First, the defendant intentionally or recklessly caused or permitted (\_\_\_\_\_) (a child) to be placed in a situation likely to [substantially harm (\_\_\_\_\_'s) (the child's) (physical, mental, or emotional health)] [cause (\_\_\_\_\_'s) (the child's) death].

[The term "reckless" means conscious and intentional conduct that the defendant knows or should know creates an unreasonable risk of harm to another. The defendant need not have intended, however, to cause harm.]

[There is no precise definition for the term "substantially harms the child's physical, mental, or emotional health." In determining whether \_\_\_\_\_ suffered physical, mental, or emotional harm, you may consider, but you are not limited to, any evidence showing that any conduct by the defendant has resulted in behavior by \_\_\_\_\_ of a type that would not normally be expected of this child, and that has interfered with \_\_\_\_\_'s normal growth and development. From all of the evidence that you have seen and heard in this case, and using your own good judgment and common sense, you must determine the meaning of the term as it relates to \_\_\_\_\_, and decide whether or not \_\_\_\_\_, as a result of any conduct of the defendant, suffered physical, mental, or emotional harm.]

["Substantial physical harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.<sup>1</sup>]

Second, the defendant's relationship to \_\_\_\_\_ was that of (parent) (legal guardian) (caretaker). [A parent may be either

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13.92

<sup>1</sup>Definition of substantial physical harm is drawn from M.S.A. § 609.02, subd. 7a.

biological or adoptive.] [A legal guardian is one who has been judicially appointed.] [The term "caretaker" means an individual who has responsibility for the care of a child as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of a child.]

Third, \_\_\_\_\_ was a child who had not reached (his) (her) eighteenth birthday at the time of the defendant's act.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of a question that will appear on the verdict form. The question is: Did the endangerment result in substantial harm to \_\_\_\_\_'s physical, mental, or emotional health? You should answer the question "yes" or "no." If you have a reasonable doubt as to the answer to the question, you should answer the question "no".

**CRIMJIG 13.93****CHILD ENDANGERMENT—EXPOSURE TO  
CONTROLLED SUBSTANCES—DEFINED**

Under Minnesota law, a (parent) (legal guardian) (care-taker) who endangers a child's person or health by knowingly causing or permitting the child to be present where any person is illegally selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.378, subd. 1(b)(2).



**CRIMJIG 13.94****CHILD ENDANGERMENT—EXPOSURE TO  
CONTROLLED SUBSTANCES—ELEMENTS**

The elements of child endangerment are:

First, the defendant knowingly caused or permitted (\_\_\_\_\_), a child, to be present where a person was illegally selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture,<sup>1</sup> or possessing (\_\_\_\_\_) (a controlled substance).

Second, the defendant's relationship to the child was that of (parent) (legal guardian) (caretaker). [A parent may be either biological or adoptive.] [A legal guardian is one who has been judicially appointed.] [The term "caretaker" means an individual who has responsibility for the care of a child as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of the child.]

Third, the child had not reached (his) (her) eighteenth birthday at the time of the defendant's act.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional

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**13.94**

<sup>1</sup>The statute applies where a person is selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture or possessing a controlled substance as defined in M.S.A. § 152.01, subdivision 4, in violation of M.S.A. §§ 152.021, 152.022, 152.023, 152.024. The suggested instruction

uses the phrase "selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance." M.S.A. § 152.01 provides the definitions for these phrases and the court may find it appropriate to more fully define the nature of the underlying violation.

issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: Did the exposure to controlled substances result in substantial harm to \_\_\_\_\_'s physical, mental or emotional health?

There is no precise definition for the term "substantial harm to the child's physical, mental, or emotional health." In determining whether \_\_\_\_\_ suffered physical, mental, or emotional harm, you may consider, but you are not limited to, any evidence showing that any conduct by the defendant has resulted in behavior by \_\_\_\_\_ of a type that would not normally be expected of this child, and that has interfered with \_\_\_\_\_'s normal growth and development. From all of the evidence that you have seen and heard in this case, and using your own good judgment and common sense, you must determine the meaning of the term as it relates to \_\_\_\_\_, and decide whether or not \_\_\_\_\_, as a result of any conduct of the defendant, suffered physical, mental, or emotional harm.

["Substantial physical harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.<sup>2</sup>]

You should answer the question "yes" or "no." If you have a reasonable doubt as to the answer, you should answer the question "no."

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#### COMMENT

In *State v. Perry*, 725 N.W.2d 761 (Minn. App. 2007) the Court of Appeals held "the state does not have to prove actual danger to a child's person or health as an element of the crime when a parent, legal guardian, or caretaker knows that a child is present where drugs are being sold, manufactured, or possessed.

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<sup>2</sup>Definition of substantial physical harm is drawn from M.S.A. § 609.02, subd. 7a.

**CRIMJIG 13.95****CHILD ENDANGERMENT BY ACCESS TO  
FIREARMS—DEFINED**

Under Minnesota law, whoever intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health or cause the child's death as the result of the child's access to a loaded firearm, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.378, subd. 1(c).



**CRIMJIG 13.96****CHILD ENDANGERMENT BY ACCESS TO  
FIREARMS—ELEMENTS**

The elements of child endangerment are:

First, the defendant intentionally or recklessly caused (\_\_\_\_\_) (a child) to be placed in a situation likely to substantially harm (\_\_\_\_\_'s) (the child's) physical health or cause (\_\_\_\_\_'s) (the child's) death as the result of the child's access to a loaded firearm.

The term "reckless" means a conscious and intentional act that the defendant knows, or should know, creates an unreasonable risk of harm to another. The defendant need not have intended, however, to cause harm.

"Substantial harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.<sup>1</sup>

Second, (\_\_\_\_\_) (the child) was under fourteen (14) years of age.

Third, as a result of the defendant's act, (\_\_\_\_\_) (the child) had access to a loaded firearm.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of a \_\_\_\_\_

13.96

<sup>1</sup>Definition of substantial bodily

harm is drawn from M.S.A. § 609.02, subd. 7a.

question on the verdict form. The question is: Did the endangerment result in substantial harm to (\_\_\_\_\_'s) (the child's) physical health?

["Substantial physical harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.]

You should answer the question "yes" or "no." If you have a reasonable doubt as to the answer, you should answer the question "no."

**CRIMJIG 13.97****NEGLIGENT STORAGE OF FIREARMS—DEFINED**

Under Minnesota law, whoever negligently stores or leaves a loaded firearm in a location where the person knows or should reasonably know that a child is likely to gain access, unless reasonable action is taken to secure the firearm against access by the child, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.666.



**CRIMJIG 13.98**

**NEGLIGENT STORAGE OF FIREARMS—ELEMENTS**

The elements of negligent storage of a firearm are:

First, the defendant negligently stored or left a loaded firearm in a location where the defendant knew or should reasonably have known that a child was likely to gain access. The term “negligence” means the doing of something that a reasonable person would not do or the failure to do something that a reasonable person would do under the circumstances. A “firearm” is a device designed to be used as a weapon that expels a projectile by the force of any explosion or force of combustion. A firearm is “loaded” if the firearm has ammunition in the chamber or magazine, if the magazine is in the firearm, unless the firearm is incapable of being fired by a child who is likely to gain access to the firearm. A “child” means a person under the age of fourteen (14) years.

Second, the defendant did not take reasonable action to secure the firearm against access by the child.

Third, the defendant’s act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

\_\_\_\_\_  
COMMENT

M.S.A. § 609.666.

**CRIMJIG 13.99****CONTRIBUTING TO THE NEGLECT OR  
DELINQUENCY OF A MINOR—DEFINED**

Under Minnesota law, whoever by act, word, or omission encourages, causes, or contributes to

- [1] the need for protection or services of a child
- [2] a child's status as a juvenile petty offender
- [3] delinquency of a child

is guilty of a crime.

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**COMMENT**

M.S.A. § 260B.425 (status as juvenile petty offender or delinquent);  
M.S.A. § 609C.425 (need for protection or services).

**CRIMJIG 13.100****CONTRIBUTING TO THE NEGLECT OR  
DELINQUENCY OF A MINOR—ELEMENTS**

The elements of contributing to the (need for protection or services) (delinquency) of a minor are:

First, \_\_\_\_\_ was under 18 years of age.

Second, the defendant by act, word, or omission (encouraged) (caused) (contributed to)

[1] the need for protection or services<sup>1</sup> of \_\_\_\_\_.

[2] the status of \_\_\_\_\_ as a juvenile petty offender.<sup>2</sup>

[3] the delinquency<sup>3</sup> of \_\_\_\_\_.

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See M.S.A. § 260C.007, subd. 4 for the definition of a child. See M.S.A. 260C.007, subd. 6, for the definition of a child in need of protection or services. See M.S.A. 260B.007, subd. 6, for the definition of a delinquent child. See M.S.A. 260B.007, subd. 16, for the definition of a juvenile petty offender

This offense is intended to provide for "[t]he protection of the morals and general well-being of minors." *State v. Sobelman*, 199 Minn. 232, 271 N.W. 484 (1937). The statute has been interpreted to proscribe

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**13.100**

<sup>1</sup>See M.S.A. 260C.007, subd. 6, for the definition of a child in need of protection or services.

<sup>2</sup>See M.S.A. 260B.007, subd. 16,

for the definition of a juvenile petty offender.

<sup>3</sup>See M.S.A. 260B.007, subd. 6 for the definition of a delinquent child.



such conduct, regardless of whether it is committed by adults or minors. *State v. Hayes*, 351 N.W.2d 654 (Minn. App. 1984).

A prosecution for contributing to the delinquency or need for protection or services of a minor does not require an adjudication of the minor. *State v. Hayes*, 351 N.W.2d 654 (Minn. App. 1984). The second element of the offense requires that the jury decide whether or not the defendant encouraged, caused, or contributed to the need for protection or services, the delinquent condition, or the child's status as a juvenile petty offender.

Intent is not an element of this offense. *State v. Sobelman*, 199 Minn. 232, 271 N.W. 484 (1937); *State v. Lundgren*, 124 Minn. 162, 144 N.W. 752 (1913).

CRIMJIG 13.101

NEGLECT OF A CHILD—DEFENSE OF GOOD FAITH RELIANCE ON SPIRITUAL MEANS OR PRAYER FOR HEALTH CARE

If a (parent) (guardian) (caretaker) responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or for remedial care of the child, this treatment shall constitute and fulfill the requirement of providing "health care."

The burden of proof is on the State to prove beyond a reasonable doubt that the defendant did not in good faith select and depend upon spiritual means or prayer for the treatment or care of a disease or for remedial care of \_\_\_\_\_.<sup>1</sup>

COMMENT

M.S.A. § 609.378.

In *State v. McKown*, 475 N.W.2d 63 (Minn.1991), *cert. denied*, 502 U.S. 1036, 112 S. Ct. 882, 116 L.Ed.2d 786 (1992), the Court ruled on a case which involved the relationship between M.S.A. §§ 609.205(1) and 609.378. The Court held that, as to that case, application of the manslaughter statute to the conduct was prohibited, as the law was unconstitutionally vague in light of the "spiritual means or prayer" defense in the child neglect statute. The Court affirmed dismissal of the charges against the defendants.

13.101

<sup>1</sup>The burden of proof as to good faith selection and dependence on spiritual means or prayer for treatment or

care, as an affirmative defense, is on the State, once the defendant has produced sufficient evidence as a matter of law to make the defense an issue in the case.

**CRIMJIG 13.102****DEFENSE TO PERMITTING CONTINUING  
PHYSICAL OR SEXUAL ABUSE OF A CHILD**

It is a defense to a prosecution of (neglect) (endangerment) by knowingly permitting the continuing physical or sexual abuse of a child that at the time of the (neglect) (endangerment) there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the physical or sexual abuse would result in retaliation causing substantial bodily harm to the defendant or the child. The burden of proof is on the State to prove beyond a reasonable doubt that the defendant did not have a reasonable apprehension that acting to stop or prevent the physical or sexual abuse would result in substantial bodily harm to the defendant or the child.

The defendant's apprehension of substantial bodily harm to defendant or the child must continue throughout the time during which the physical or sexual abuse of the child is being committed. It must not have been possible for the defendant to withdraw the child in safety.

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**COMMENT**

M.S.A. § 609.378.

The burden of proof as to "reasonable apprehension of harm to the defendant or the child" as an affirmative defense is on the State, once the defendant has produced sufficient evidence as a matter of law to make the defense an issue in the case.



## CRIMJIG 13.103

### COERCION—DEFINED

Under Minnesota law, whoever

[1] threatens to unlawfully inflict bodily harm upon another

[2] threatens to unlawfully hold another person in confinement

[3] threatens to unlawfully inflict damage on the property of another

[4] threatens to unlawfully injure the trade, business, profession, or calling of another

[5] threatens to expose a secret or deformity or otherwise to expose any person to disgrace or ridicule

[6] threatens to publish a defamatory statement or otherwise to expose any person to disgrace or ridicule

[7] threatens to make (or cause to be made) a criminal charge, whether true or false

and (thereby) (in that way) causes another person against his or her will to do any act or forebear doing a lawful act, is guilty of a crime.

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#### COMMENT

M.S.A. § 609.27.

**CRIMJIG 13.104****COERCION—ELEMENTS**

The elements of coercion are:

First, the defendant communicated a threat to \_\_\_\_\_

[1] to unlawfully inflict bodily harm on \_\_\_\_\_. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

[2] to unlawfully hold \_\_\_\_\_ in confinement.

[3] to unlawfully inflict damage on \_\_\_\_\_, the property of \_\_\_\_\_.

[4] to unlawfully injure \_\_\_\_\_'s (trade) (business) (profession) (calling) of \_\_\_\_\_.

[5] to expose (a secret) (a deformity) of \_\_\_\_\_, exposing \_\_\_\_\_ (or another) to disgrace or ridicule.

[6] to make to (\_\_\_\_\_) (another person) a defamatory statement about \_\_\_\_\_, exposing \_\_\_\_\_ to disgrace or ridicule. A "defamatory statement" is an untrue statement about a person that would injure that person's name or reputation.

[7] to make (or cause to be made) a criminal charge of \_\_\_\_\_ against \_\_\_\_\_. (It does not matter whether the charge was true or false.)

Second, the defendant acted with the intent of causing \_\_\_\_\_ (to \_\_\_\_\_) (to refrain from \_\_\_\_\_).

Third, as a result of the threat, \_\_\_\_\_ (did \_\_\_\_\_ against (his) (her) will) (refrained from \_\_\_\_\_, which it was (his) (her) legal right to do).

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty of coercion, there is an additional issue you must determine, and it will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Was the benefit received (or to be received) by the defendant or the loss suffered (or to be suffered) by \_\_\_\_\_ measurable in money? If you do not find beyond a reasonable doubt that the benefit or loss was measurable in money, you should answer this question "no." The next question(s) to be answered, if the first question is answered "yes," (is) (are): Was the value of the benefit or loss \$2500 or more? Was the value of the benefit or loss more than \$300 but less than \$2500? Was the value of the benefit or loss not more than \$300? If you have a reasonable doubt as to the value of the benefit or loss, you should answer "yes" to the lesser of the values you believe it had.

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COMMENT

M.S.A. §§ 609.27, 609.275.



**CRIMJIG 13.105**

**DEFENSE OF GOOD FAITH TO THE THREAT OF  
MAKING A CRIMINAL CHARGE**

A (peace officer) (prosecuting attorney) is not guilty of coercion if in good faith (he) (she) warns a person of what will happen if that person in the future commits a violation of the law.

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**COMMENT**

M.S.A. § 609.27, subd. 1(5).

“Peace officer” is defined in M.S.A. § 626.84, subd. 1.

**CRIMJIG 13.106****TERRORISTIC THREAT—THREAT TO COMMIT A  
CRIME OF VIOLENCE—DEFINED**

Under Minnesota law, whoever threatens, directly or indirectly, to commit a crime of violence with intent to [terrorize another] [cause evacuation of a building, place of assembly, or facility of public transportation] [cause serious public inconvenience] [or] in reckless disregard of causing [such terror] [such evacuation] [such inconvenience], is guilty of a crime.

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**COMMENT**

M.S.A. § 609.713, subd. 1.

**CRIMJIG 13.107****TERRORISTIC THREAT—THREAT TO COMMIT A  
CRIME OF VIOLENCE—ELEMENTS**

The elements of making a terroristic threat are:

First, the defendant threatened, directly or indirectly, to commit a crime of violence. [You are instructed that [HERE INSERT THE DEFINITION OF THE SPECIFIC CRIME OF VIOLENCE<sup>1</sup> (e.g., Assault in the Second Degree)] is a crime of violence. The elements of [HERE INSERT NAME AND ELEMENTS OF THE CRIME OF VIOLENCE WHICH DEFENDANT THREATENED].] It need not be proven that the defendant had the actual intention of carrying out the threat.

Second, the defendant made the threat with [intent to terrorize (another) (\_\_\_\_\_) or in reckless disregard of the risk of causing such terror] [purpose to cause evacuation of a building, place of assembly, or facility of public transportation, or to cause serious public inconvenience, or in disregard of the risk of causing such evacuation or inconvenience].

[“To terrorize” means to cause extreme fear by use of violence or threats. “With intent to terrorize” means to have the specific purpose or intention of causing extreme fear. “In reckless disregard of the risk of causing such terror” means that the defendant, even though not having the specific purpose of terrorizing another, recklessly risks the danger that the statements would be taken as threats by another and that they would cause extreme fear. It need not be proven that (another) (\_\_\_\_\_) actually experienced extreme fear.]

[“With purpose to cause evacuation or serious public inconvenience” means to have the specific purpose or intention of causing such evacuation or serious public inconvenience. “In reckless disregard of the risk of causing such evacuation or serious public inconvenience” means that the defendant, even

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13.107

1(d) for definition of “violent crime.”

<sup>1</sup>See M.S.A. § 609.1095, subd.



though not having that specific purpose of terrorizing another, recklessly risked the danger that the statements would cause such evacuation or serious public inconvenience. It need not be proven that evacuation or serious public inconvenience actually occurred.]

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

In *State v. Jorgenson*, 758 N.W.2d 316 (Minn. App. 2008) the Court of Appeals held the use of the general term "assault" in defining a crime of violence was insufficient, as the term includes fourth and fifth degree assault, which are misdemeanors. The court held that the jury must find the defendant made to commit a specific predicate crime of violence, as defined by M.S.A. § 609.1095, subd. 1(d) and that the jury must be instructed on the elements of that specific predicate offense.

The definition of "to terrorize" comes from *State v. Franks*, 765 N.W.2d 68 (Minn. 2009). See also *State v. Shweppe*, 237 N.W.2d 609 (Minn. 1975).

**CRIMJIG 13.108****TERRORISTIC THREAT—COMMUNICATION OF  
PRESENCE OF EXPLOSIVE, EXPLOSIVE DEVICE  
OR INCENDIARY DEVICE—DEFINED**

Under Minnesota law, whoever with intent to terrorize another or in reckless disregard of causing such terror communicates to another that [explosives<sup>1</sup>] [an explosive device] [any incendiary device] is present at a named place or location, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.713, subd. 2.

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**13.108**

<sup>1</sup>See M.S.A. § 299F.72 for definition of explosive and M.S.A. § 609.668, subd 1 for definitions of explosive and

incendiary devices. See CRIMJIGs 18.17 through 18.24 for definitions and jury instructions relating to explosives and explosive and incendiary devices.

**CRIMJIG 13.109****TERRORISTIC THREAT—COMMUNICATION OF  
PRESENCE OF EXPLOSIVES, EXPLOSIVE DEVICE  
OR INCENDIARY DEVICE—ELEMENTS**

The elements of a terroristic threat are:

First, the defendant communicated to another that [explosives] [an explosive device] [an incendiary device] (was) (were) present at a named place or location. It does not need to be proven that the [explosive] [an explosive device] [an incendiary device]<sup>1</sup> was actually present at the named place or location.

Second, the defendant made that communication with the intent to terrorize another in reckless disregard of the risk of causing such terror. "To terrorize" means to cause extreme fear by use of violence or threats. "With intent to terrorize" means to have the specific purpose or intention of causing extreme fear. "In reckless disregard of the risk of causing such terror" means that the defendant, even though not having the specific purpose of terrorizing another, recklessly risks the danger that the communication would cause extreme fear.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See CRIMJIGs 18.17 through 18.24 for definitions of "explosives," "explosive device," and "incendiary device."

The definition of "to terrorize" comes from *State v. Franks*, 765

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**13.109**

<sup>1</sup>See CRIMJIGs 18.17 through 18.24 for definitions of "explosives,"

"explosive device," and "incendiary device."



N.W.2d 68 (Minn. 2009). See also *State v. Shweppe*, 237 N.W.2d 609 (Minn. 1975).

**CRIMJIG 13.110****TERRORISTIC THREATS—(REPLICA FIREARMS)  
(BB GUNS)—DEFINED**

Under Minnesota law, whoever displays, exhibits, brandishes or otherwise employs a (replica firearm) (BB gun) in a threatening manner and [causes or attempts to cause terror] [acts in reckless disregard of the risk of causing terror] in another person, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.713, subd. 3.

**CRIMJIG 13.111****TERRORISTIC THREATS—(REPLICA FIREARMS)  
(BB GUNS)—ELEMENTS**

The elements of terroristic threats are:

First, the defendant displayed, exhibited, brandished, or otherwise employed a (replica firearm) (BB gun) in a threatening manner. [A "replica firearm" means a device or object that is a facsimile or toy version of, and reasonably appears to be, a pistol, revolver, shotgun, sawed-off shotgun, rifle, machine gun, rocket launcher, or any other firearm. A replica firearm includes a device or object designed to fire only blanks.] [A "BB gun" means a device that fires or ejects a shot measuring .18 of an inch or less in diameter.]

Second, the defendant [caused or attempted to cause terror] [acted in reckless disregard of the risk of causing terror] in (\_\_\_\_\_) (another person). "Terror" is a condition of extreme fear.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

Unlike a violation of M.S.A. § 609.713, subd. 1 or 2, this statute does not appear to require proof of the defendant's specific intent.



**CRIMJIG 13.112****RIOT IN THE FIRST DEGREE—DEFINED**

Under Minnesota law, when three or more persons are assembled and disturb the public peace by an intentional act or threat of unlawful force or violence to person or property and a death results, if one is armed with a dangerous weapon, that person is guilty of a crime.

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**COMMENT**

M.S.A. § 609.71, subd. 1.

**CRIMJIG 13.113**

**RIOT IN THE FIRST DEGREE—ELEMENTS**

The elements of riot in the first degree are:

First, the defendant was one of three or more persons assembled together.

Second, those assembled disturbed the public peace by an intentional act or threat of unlawful force or violence to person or property.

Third, the defendant was armed with a dangerous weapon. [A “dangerous weapon” is a firearm, whether loaded or unloaded, any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that in the manner used or intended to be used is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.]

Fourth, \_\_\_\_\_ died as a result of the assembly.

Fifth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 13.114**

**RIOT IN THE SECOND DEGREE—DEFINED**

Under Minnesota law, when three or more persons assemble and disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, and one is armed with a dangerous weapon or knows that any other participant is armed with a dangerous weapon, each person is guilty of a crime.

\_\_\_\_\_

**COMMENT**

M.S.A. § 609.71, subd. 2.



**CRIMJIG 13.115**

**RIOT IN THE SECOND DEGREE—ELEMENTS**

The elements of riot in the second degree are:

First, the defendant was one of three or more persons assembled together.

Second, those assembled disturbed the public peace by an intentional act or threat of unlawful force or violence to person or property.

Third, the defendant was armed with a dangerous weapon or knew that any other participant was armed with a dangerous weapon. [A “dangerous weapon” is a firearm, whether loaded or unloaded, any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that in the manner used or intended to be used is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.]

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 13.116**

**RIOT IN THE THIRD DEGREE—DEFINED**

Under Minnesota law, when three or more persons assemble and disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant is guilty of a crime.

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COMMENT

M.S.A. § 609.71, subd. 3.

**CRIMJIG 13.117**

**RIOT IN THE THIRD DEGREE—ELEMENTS**

**The elements of riot in the third degree are:**

**First, the defendant was one of three or more persons assembled together.**

**Second, those assembled disturbed the public peace by an intentional act or threat of unlawful force or violence to person or property.**

**Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.**

**If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.**



## CRIMJIG 13.118

### UNLAWFUL ASSEMBLY—DEFINED

Under Minnesota law, when three or more persons assemble

- [1] with intent to commit any unlawful act by force,
- [2] with intent to carry out any purpose in such a manner as will disturb or threaten the public peace,
- [3] without unlawful purpose, but so conducting themselves in a disorderly manner as to disturb or threaten the public peace,

each person is guilty of a crime.

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#### COMMENT

M.S.A. § 609.705.

## CRIMJIG 13.119

### UNLAWFUL ASSEMBLY—ELEMENTS

The elements of unlawful assembly are:

First, the defendant assembled with two or more other persons.

Second, the defendant, with the assembled persons,

[1] intended to commit an unlawful act by use of force.

[2] intended to carry out a purpose in a way that would disturb or threaten the public peace.

[3] acted in a disorderly manner that threatened or disturbed the public peace by unreasonably denying or interfering with the rights of others to peacefully use their property or public facilities without obstruction, interference, or disturbance.

[If you find the defendant's conduct consisted only of offensive, obscene, or abusive language, you must also find that the words used were "fighting words." "Fighting words" are words that constitute personally offensive epithets that, when spoken to the ordinary person under the particular circumstances of the case, are, as a matter of common knowledge, inherently likely to provoke a violent reaction or incite an immediate breach of the peace by those to whom such words are addressed. The offense may be based upon the utterance of fighting words alone, without resulting in actual violence. The focus is upon the nature of the words and the circumstances in which they were spoken, rather than upon the actual response.]

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable

doubt, the defendant is not guilty.

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COMMENT

The term “public peace” ordinarily need not be defined, but where it is at issue, the jury may be instructed as follows: “‘Public peace’ means ‘that tranquility enjoyed by a community when good order reigns amongst its members.’” *State v. Hipp*, 298 Minn. 81, 213 N.W.2d 610 (1973) (quoting *State v. Winkels*, 204 Minn. 466, 283 N.W. 763 (1939)).

That portion of [3] in the second element referring to “unreasonably denying or interfering with the rights of others to peacefully use their property or public facilities without obstruction, interference, or disturbance” is taken directly from *State v. Hipp*, 298 Minn. 81, 213 N.W.2d 610 (1973), which held that the application of the statute must be so limited in order to withstand constitutional scrutiny.

If the defendant is alleged to have acted in a disorderly manner by the use of words alone, the trial court must include the bracketed portion under [3] of the second element in order to withstand constitutional scrutiny. In *State v. Hipp, supra*, the Supreme Court cautioned that the statute could otherwise be “susceptible of application which could infringe on protected First Amendment rights.” However, as long as the jury is fully informed, the statute is enforceable to regulate conduct so proscribed. If the alleged conduct by the defendant does not constitute words alone, the bracketed portion need not be read. In those cases where the defendant is accused of both physical conduct and words, the more cautious approach would be to include the bracketed portion to ensure the defendant is not improperly convicted if the jury discounts the evidence of physical conduct, leaving only the defendant’s language as the basis for the conviction.

Although the statute proscribes language that is offensive, obscene, or abusive if it tends reasonably to arouse alarm, anger, or resentment in others, the Minnesota Supreme Court has upheld its constitutionality only when applied to “fighting words.” *City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980); *State v. White*, 292 N.W.2d 16 (Minn. 1980); *Matter of the Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978); *City of St. Paul v. Mulnix*, 304 Minn. 456, 232 N.W.2d 206 (1975); *State v. Korich*, 219 Minn. 268, 17 N.W.2d 497 (1945).

If the alleged criminal conduct consists of the use of words alone, the trial court must include the bracketed portion under [3] of the second element in order to withstand constitutional challenge. If the defendant’s conduct consists only of physical acts, the bracketed portion need not be read. In those cases where the defendant is accused of both physical acts and words, the bracketed portion in the instruction should



be read in order to fully protect the defendant's right to freedom of speech.

In *City of Little Falls v. Witucki*, 295 N.W.2d 243, 246 (Minn. 1980), the Supreme Court distinguished the nature of the words spoken and the circumstances in which they were spoken from the actual response of the person to whom they are spoken. Thus, that part of the bracketed portion under [3] of the second element, which states that violence need not result in order for language to be within the fighting words category of unprotected speech, is included. "The actual response of the addressee or object of the words is relevant, but not determinative, of the issue of whether the utterances meet the fighting words test."

**CRIMJIG 13.120****DISORDERLY CONDUCT—DEFINED**

Under Minnesota law, whoever, in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger, or disturb others, or provoke an assault or breach of the peace

[1] engages in brawling or fighting,

[2] disturbs an assembly or meeting, not unlawful in its character,

[3] engages in offensive, obscene, abusive, boisterous, or noisy conduct, or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.72, subd. 1.

*State v. Soukup*, 656 N.W.2d 424 (Minn. App. 2003) held that self-defense is applicable to a charge of disorderly conduct where the behavior forming the basis of the offense presents the threat of bodily harm (involves a crime against the person). See Comment to CRIMJIG 7.05 for further discussion.

**CRIMJIG 13.121**

**DISORDERLY CONDUCT—ELEMENTS**

**The elements of disorderly conduct are:**

**[1]    First, the defendant engaged in brawling or fighting.**

**[2]    First, the defendant disturbed an assembly or meeting, not unlawful in its character.**

**[3]    First, the defendant engaged in offensive, obscene, abusive, boisterous, or noisy conduct, or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.**

**[If you find that the defendant's conduct consisted only of offensive, obscene, or abusive language, you must also find that the words used were "fighting words." "Fighting words" are words that constitute personally offensive epithets that, when spoken to the ordinary person, under the particular circumstances of the case, are, as a matter of common knowledge, inherently likely to provoke a violent reaction or incite an immediate breach of the peace by those to whom such words are addressed. The offense may be based upon the utterance of fighting words alone, without resulting in actual violence. The focus is upon the nature of the words and the circumstances in which they were spoken, rather than upon the actual response.]**

**Second, the defendant knew, or had reasonable grounds to know, that the conduct would, or could, tend to (alarm) (anger) (disturb) (provoke an assault by) (provoke a breach of the peace by) others.**

**Third, the defendant's act took place in a public or private place.**

**Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.**

**If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find**



that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

Although the statute proscribes language that is offensive, obscene, or abusive if it tends reasonably to arouse alarm, anger, or resentment in others, the Minnesota Supreme Court has upheld its constitutionality only when applied to “fighting words.” *City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980); *State v. White*, 292 N.W.2d 16 (Minn. 1980); *Matter of the Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978); *City of St. Paul v. Mulnix*, 304 Minn. 456, 232 N.W.2d 206 (1975); *State v. Korich*, 219 Minn. 268, 17 N.W.2d 497 (1945).

If the alleged criminal conduct consists of the use of words alone, the trial court must include the bracketed portion under the first element in order to withstand constitutional challenge. If the defendant’s conduct consists only of physical acts, the bracketed portion need not be read. In those cases where the defendant is accused of both physical acts and words, the bracketed portion in the instruction should be read in order to fully protect the defendant’s right to freedom of speech. In *In re Welfare of T.L.S.*, 713 N.W.2d 877 (Minn. Ct. App. 2006), the Minnesota Court of Appeals held that if the defendant’s conduct consists of the delivery of speech which is disorderly because of its boisterous or noisy manner and not because of the content of the speech, the statute may be applied to words that are not “fighting words.” If the alleged criminal conduct consists of noisy conduct, the trial court should consider whether the bracketed portion should be read.

In *City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980), the Supreme Court distinguished the nature of the words spoken and the circumstances in which they were spoken from the actual response of the person to whom they are spoken. Thus, that part of the bracketed portion under the first element, which states that violence need not result in order for language to be within the fighting words category of unprotected speech, is included. “The actual response of the addressee or object of the words is relevant, but not determinative, of the issue of whether the utterances meet the fighting words test.”

## CRIMJIG 13.122

### PUBLIC NUISANCE—DEFINED

Under Minnesota law, whoever by an act or failure to perform a legal duty intentionally

[1] (maintains) (permits) a condition that unreasonably annoys, injures, or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public,

[2] (interferes with) (obstructs) (renders dangerous for passage) any (public highway or right-of-way) (waters used by the public),

is guilty of a crime.

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#### COMMENT

M.S.A. § 609.74, subds. 1 and 2.

The statute also contains an all-inclusive provision, which provides that a person has violated the law if the person “[i]s guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided.” M.S.A. § 609.74(3). Since the particular language defines the proscribed conduct as that which constitutes a “public nuisance” as defined by some other statute, the offense would not be defined under M.S.A. § 609.74, subd. 3, and, therefore, such language has been excluded from the instruction.

**CRIMJIG 13.123****PUBLIC NUISANCE—ELEMENTS**

The elements of public nuisance are:

[1] First, the defendant acted intentionally.

[2] First, the defendant failed to perform a legal duty. The defendant had a legal duty to \_\_\_\_\_.<sup>1</sup>

Second, by such (act) (failure to perform a legal duty), the defendant

[1] (maintained) (permitted) a condition that unreasonably (annoyed) (injured) (endangered the safety, health, morals, comfort, or repose of) any considerable number of members of the public.

[2] (interfered with) (obstructed) (rendered dangerous for passage) any (public highway or right-of-way) (waters used by the public).

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

In a civil case that interpreted this public nuisance statute, the Supreme Court concluded that "[t]he element of obstruction or interference with the use and enjoyment of the [victim's] property is essential to the maintenance of th[e] action." *Jones v. Farnham*, 299 Minn. 156, 216 N.W.2d 834 (1974). However, such disruption in the use and enjoyment of property is presumed where certain activities occur on a public

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**13.123**

duty should be defined by the court.

<sup>1</sup>The extent of and nature of the



highway, right-of-way, or waters. *Dornack v. Barton Const. Co.*, 272 Minn. 307, 137 N.W.2d 536 (1965); but see *State v. Otterstad*, 734 N.W.2d 642 (Minn. 2007).

**CRIMJIG 13.124****ADULTERATION OF SUBSTANCE WHICH COULD  
CAUSE DEATH OR BODILY HARM—DEFINED**

Under Minnesota law, whoever, knowing, or having reason to know, that the adulteration will cause death or is capable of causing death, bodily harm, or illness, adulterates any substance with intent to cause death, bodily harm, or illness is guilty of a crime.

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**COMMENT**

M.S.A. § 609.687.

**CRIMJIG 13.125****ADULTERATION OF SUBSTANCE WHICH COULD CAUSE DEATH OR BODILY HARM—ELEMENTS**

The elements of the crime of adulteration of a substance are:

First, the defendant adulterated a substance. “Adulteration” is the intentional adding of any substance that has the capacity to cause death, bodily harm, or illness by ingestion, injection, inhalation, or absorption, to a substance having a customary or reasonably foreseeable human use.

Second, the defendant knew or had reason to know that adulteration of the substance would cause death or was capable of causing death, bodily harm, or illness. “Bodily harm” is defined as physical pain or injury, illness, or any impairment of physical condition.

Third, the defendant intended that the adulterated substance cause death, bodily harm, or illness.

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See M.S.A. § 609.02, subd. 7 for definition of “bodily harm.”



**CRIMJIG 13.126****DISTRIBUTION OF AN ADULTERATED  
SUBSTANCE—DEFINED**

Under Minnesota law, whoever, knowing or having reason to know that a substance has been adulterated, distributes, disseminates, gives, sells, or otherwise transfers the adulterated substance with the intent to cause death, bodily harm, or illness is guilty of a crime.

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**COMMENT**

M.S.A. § 609.687. subd. 2(b)

**CRIMJIG 13.127****DISTRIBUTION OF AN ADULTERATED  
SUBSTANCE—ELEMENTS**

The elements of distribution of an adulterated substance are:

First, the defendant knew or had reason to know that the substance was adulterated. The statutes define “adulteration” as the intentional adding of any substance that has the capacity to cause death, bodily harm, or illness by ingestion, injection, inhalation, or absorption, to a substance having a customary or reasonably foreseeable human use.

Second, the defendant distributed, disseminated, gave, sold, or otherwise transferred the adulterated substance.

Third, the defendant intended that the adulterated substance cause death, bodily harm, or illness. “Bodily harm” is defined as physical pain or injury, illness, or any impairment of physical condition.

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

*See M.S.A. § 609.02, subd. 7, for definition of “bodily harm.”*

**CRIMJIG 13.128**

## NONSUPPORT OF A SPOUSE OR CHILD— DEFINITION

Under Minnesota law, whoever is legally obligated to provide court-ordered support to a (spouse) (or) (a child, whether or not the child's custody has been granted to another) and who knowingly omits and fails to do so [without lawful excuse<sup>1</sup>] is guilty of a crime.

## COMMENT

M.S.A. § 609.375.

An attempt by the State to obtain a court order holding the person in contempt for failing to pay support during the time period specified in the complaint is a condition precedent to charging criminal non-support of a child. *State v. Nelson*, 671 N.W.2d 587 (Minn. App. 2003).

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volving obligations prior to 2001.

<sup>1</sup>Use this language for cases in-



**CRIMJIG 13.129**

**NONSUPPORT OF A SPOUSE OR CHILD—  
ELEMENTS**

**The elements of nonsupport of a (spouse) (or) (child) are:**

**First, the defendant was legally obligated to provide court-ordered support to a (spouse) (or) (a child, whether or not the child's custody has been granted to another). ["Care" means nonmonetary obligations to a (spouse) (or) (child) to provide watchful oversight, attentive assistance, or supervision.] ["Support" means the obligation to provide monetary assistance or other material necessities to a (spouse) (or) (child).]**

**Second, the defendant knowingly omitted and failed to do so.**

**[Third, the defendant was without lawful excuse.](Use this language only in cases involving obligations prior to 2001).**

**[Third] [Fourth], the defendant's acts or some part of the defendant's acts took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.**

**If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any elements has not been proven beyond a reasonable doubt, defendant is not guilty.**

**If you find the defendant guilty, you will have (an) additional issue(s) to determine and they will be put to you in the form of (a) question(s) on the verdict form. You will answer the questions "yes" or "no." If you have a reasonable doubt as to the answer to a question, answer "no."**

**Did the violation continue for a period in excess of 90 days, but not more than 180 days? Did the violation continue for a period in excess of 180 days?**

**Is the defendant in arrears in court-ordered (child support) (or) (and) (maintenance) payments in (an amount equal to or**

greater than six times but less than nine times the defendant's total monthly (support) (or) (and) (maintenance) obligation? Is the defendant in arrears in court ordered (child support) (or) (and) (maintenance) payments in (an amount equal to or greater than nine times the defendant's total monthly (support) (or) (and) (maintenance) obligation?

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COMMENT

M.S.A. § 609.375.

Definitions of “care” and “support” are taken from *State v. Nelson*, 842 N.W.2d 433 (Minn. 2014).

In *State v. Burg*, 648 N.W.2d 673 (Minn. 2002) the Supreme Court held that under the previous statute, the state had the burden of showing the defendant was without legal excuse. The statute was amended in 2001, making legal excuse an affirmative defense to the charge of nonsupport that the defendant must establish by a preponderance of the evidence.

**CRIMJIG 13.130****NON-SUPPORT OF A SPOUSE OR CHILD—  
DEFENSE**

**(Do not use this instruction in cases involving obligations arising prior to 2001.)** It is a defense to the charge of non-support of a (spouse) (or) (and) (child) that the defendant proves by a preponderance of the evidence that (he) (she) had a lawful excuse for (his) (her) failure to provide court-ordered support. "Preponderance of the evidence" means that all the evidence produced must lead you to believe it more likely that the claim is true than not true.

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**COMMENT**

M.S.A. § 609.375, subd. 8.



**CRIMJIG 13.131**

**DOMESTIC ASSAULT BY STRANGULATION—  
DEFINED**

The statutes of Minnesota provide that whoever assaults a family or household member by strangulation is guilty of a crime.

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COMMENT

M.S.A. § 609.2247.

**CRIMJIG 13.132****DOMESTIC ASSAULT BY STRANGULATION—  
ELEMENTS**

The elements of domestic assault by strangulation are:

First, the defendant assaulted \_\_\_\_\_ (the victim). [Insert CRIMJIG 13.01 for assault with intent to cause fear. Insert CRIMJIG 13.02 for infliction of harm. Insert both CRIMJIG 13.01 and 13.02 if the charge is combined intent to cause fear and infliction of bodily harm.<sup>1</sup> Because this form of assault involves infliction of harm, CRIMJIG 13.02 will usually be the most appropriate instruction.]

Second, \_\_\_\_\_ (the victim) was a member of defendant's family or household. "Family or household member" means \_\_\_\_\_.

Third, the assault was committed by strangulation. "Strangulation" means intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

Fourth, the defendant's act took place on or about \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of the elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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<sup>1</sup>In *State v. Dalbec*, 789 N.W.2d 508 (Minn. Ct. App. 2010), the Minnesota Court of Appeals stated that intentionally inflicting bodily harm, attempting to inflict bodily harm, and acting with intent to cause fear are alternative means by which an assault may be committed. The court upheld a jury instruction which combined these

alternative means into one instruction as against a challenge to the unanimity of the verdict. But the court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts and the Committee recommends that as the best approach.

**CRIMJIG 13.133****DISARMING A PEACE OFFICER—DEFINED**

The statutes of Minnesota provide that whoever intentionally takes possession of a defensive device being carried by a peace officer or from the area within the officer's immediate control, without the officer's consent, while the officer is engaged in the performance of official duties is guilty of a crime.

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**COMMENT**

M.S.A. § 609.504, subd. 2.



**CRIMJIG 13.134**

**DISARMING A PEACE OFFICER—ELEMENTS**

**The elements of disarming a peace officer are:**

**First, the officer (was carrying) (had within the area of the officer's immediate control) a defensive device. A "defensive device" includes a firearm, a dangerous weapon, an authorized tear gas compound, an electronic incapacitation device, a club or baton, and any item issued by the officer's employer to the officer to assist in the officer's protection.**

**Second, the officer was engaged in the performance of official duties.**

**Third, the defendant took possession of the defensive device (from the officer) (from the area within the officer's immediate control).**

**Fourth, the defendant took the device without the officer's consent.**

**Fifth, the defendant took the device intentionally.**

**Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.**

**If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.**

**CRIMJIG 13.135****CRIMINAL NEGLECT OF A VULNERABLE ADULT—  
DEPRIVATION—DEFINED**

Under Minnesota law, whoever is a (caregiver) (operator) and intentionally deprives a vulnerable adult of necessary food, clothing, shelter, health care, or supervision, [knowing or having to reason to know that the deprivation could likely result in [substantial bodily harm] [or] great bodily harm] [over an extended period of time], when that (caregiver) (operator) is reasonably able to make the necessary provisions, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.233, subd. 1a.

**CRIMJIG 13.136****CRIMINAL NEGLECT—VULNERABLE ADULT—  
DEPRIVATION—ELEMENTS**

The elements of criminal neglect of a vulnerable adult are:

First, the defendant was (a caregiver) (operator) with respect to a vulnerable adult. A "caregiver" is an individual or facility having responsibility for the care of a vulnerable adult as the result of a family relationship, or having assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract or by agreement. An "operator" is any person whose duties and responsibilities evidence actual control of administrative activities or authority for the decision making of or by a facility. A facility is \_\_\_\_\_.<sup>1</sup>

Second, \_\_\_\_\_ was a vulnerable adult. A "vulnerable adult" is a person who is 18 years of age or older who (is a resident inpatient of a facility) (receives services at or from a facility required to be licensed by the Commissioner of Human Services to serve adults, except that a person who receives outpatient services for treatment of chemical dependency or mental illness or who has been committed as a sexual psychopathic personality or sexually dangerous person is not considered a vulnerable adult unless that person possesses a physical or mental infirmity or there is physical or mental emotional dysfunction that impairs the person's ability to provide adequately for his or her own care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect self from maltreatment) (receives services from a home care provider licensed by the Commissioner of Human Services or from a person or organization that exclusively offers, provides, or arranges for personal care assistance services) (regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emo-

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for further definition of a facility.

<sup>1</sup>See M.S.A. § 609.232, subd. 3,



tional dysfunction that impairs the person's ability to provide adequately for his or her care without assistance, including the provision of food, shelter, clothing, health care, or supervision, and, because of the dysfunction or infirmity and the need for assistance, has an impaired ability to protect his or her self from maltreatment).

Third, the defendant intentionally deprived \_\_\_\_\_ of necessary food, clothing, shelter, health care, or supervision.

[Fourth, the defendant knew or had reason to know that the deprivation could likely result in (substantia bodily harm) (or) (great) bodily harm. "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member. "Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.]

[Fourth, the deprivation continued over an extended period of time.]

Fifth, the defendant was reasonably able to make the necessary provisions.

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty, you will have (an) additional issue(s) to decide which will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Did \_\_\_\_ (the victim) suffer substantial bodily harm? Did \_\_\_\_ (the victim) suffer great bodily harm?

**COMMENT**

*See M.S.A. § 609.232, subd. 3, for further definition of a facility.*

**CRIMJIG 13.137****CRIMINAL NEGLECT OF A VULNERABLE ADULT—  
AFFIRMATIVE DEFENSE**

The defendant is not guilty of violating this statute if you are convinced, by a preponderance of the evidence, that:

[1] the defendant is an individual employed by a (facility) (or) (operator) and does not have managerial or supervisory authority, and was unable to reasonably make necessary provisions because of inadequate staffing levels, inadequate supervision, or institutional policies.

[2] the defendant is (a facility) (an operator) (or) (an employee of a facility or operator in position of managerial or supervisory authority) and did not knowingly, intentionally, or recklessly permit criminal acts by its employees or agents that resulted in harm to the vulnerable adult.

[3] the defendant is a caregiver and failed to perform acts necessary to prevent the applicable level of harm, if any, to the vulnerable adult because the caregiver was acting reasonably and necessarily to provide care to another identified vulnerable adult.

By the term “preponderance of the evidence,” it is meant that all of the evidence produced must lead you to believe it is more likely that the claim is true than not true. If you are not so convinced, the defense has not been proven, and if the State has proven each element of the offense beyond a reasonable doubt, the defendant is guilty.



## CHAPTER 14

### ROBBERY

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### CRIMJIG 14.01

#### SIMPLE ROBBERY—DEFINED

Under Minnesota law, whoever, knowing (he) (she) is not entitled to do so, takes personal property from another, either from the person or in the presence of the person, and uses force or the threat of imminent force against the person to overcome resistance or powers of resistance to, or compel acquiescence in the taking or carrying away of the property, is guilty of a crime.

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#### COMMENT

M.S.A. § 609.24.

**CRIMJIG 14.02****SIMPLE ROBBERY—ELEMENTS**

The elements of robbery are:

First, the defendant took \_\_\_\_\_ (from the person of) (in the presence of) \_\_\_\_\_.

Second, the defendant knew (he) (she) was not entitled to \_\_\_\_\_.

Third, the defendant used (force) (or) (the threat of imminent force) against \_\_\_\_\_ to (overcome resistance) (or) (overcome the power of resistance to) (or) (compel acquiescence in) the taking or carrying off of the \_\_\_\_\_. The term “threat of imminent force” means the intentional creation in \_\_\_\_\_’s mind of an understanding that if the person resisted or refused to cooperate, force would immediately be used against the person.

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.24.

The term “or in the presence” contemplates a case where the property is not on one’s person but nearby, and by the use of force the defendant prevents victim from defending against the taking of it. Criminal Code Advisory Committee Comment.

Threats against property rather than the person are not included in robbery, but are covered by coercion. M.S.A. § 609.27; CRIMJIGs 13.100–13.103.

The only specific state of mind required is knowledge that the defendant is not entitled to take the property. See *State v. Sandve*, 279 Minn. 229, 156 N.W.2d 230 (1968).

It is probably unnecessary to define "force," but a definition, if desired, is found in CRIMJIG 12.01.

In *State v. Stanifer*, 382 N.W.2d 213 (Minn. App. 1986), the Court of Appeals held the assault in the fifth degree is a lesser-included offense to the crime of simple robbery.

In *State v. Coleman*, 356 N.W.2d 752 (Minn. App. 1984), the Court of Appeals held that in most circumstances the offense of theft is a lesser included offense to the crime of robbery, and that it was reversible error to fail to instruct the jury in the lesser offense.

See also *State v. Sandve*, 279 Minn. 229, 156 N.W.2d 230 (1968); *Duluth Street Railway Co. v. Fidelity & Deposit Co. of Maryland*, 136 Minn. 299, 161 N.W. 595 (1917); *State v. O'Neil*, 71 Minn. 399, 73 N.W. 1091 (1898).



**CRIMJIG 14.03****AGGRAVATED ROBBERY—FIRST DEGREE—  
DEFINED**

Under Minnesota law, whoever, knowing (he) (she) was not entitled to do so, takes personal property from another, either from the person or in the presence of the person, and uses force or the threat of imminent force against any person to overcome resistance or the power of resistance to or compel acquiescence in the taking or carrying away of the property, is guilty of a crime, if the defendant is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another person.

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**COMMENT**

M.S.A. § 609.245, subd. 1.

**CRIMJIG 14.04****AGGRAVATED ROBBERY—FIRST DEGREE—  
ELEMENTS**

The elements of aggravated robbery in the first degree are:

First, the defendant took \_\_\_\_\_ from (the person of) (or) (in the presence of) \_\_\_\_\_.

Second, the defendant knew that (he) (she) was not entitled to take it.

Third, the defendant used (force) (or) (the threat of imminent force) against \_\_\_\_\_ to (overcome resistance) (or) (overcome the powers of resistance to) (or) (compel acquiescence in) the taking or carrying off of the \_\_\_\_\_. The term "threat of imminent force" means the intentional creation in \_\_\_\_\_'s mind of an understanding that if (he) (she) resisted or refused to cooperate, force would immediately be used against (him) (her).

Fourth, the defendant (was armed with a dangerous weapon) (or) (was armed with any article used or fashioned in a manner to lead \_\_\_\_\_ to reasonably believe the article to be a dangerous weapon) (or) (inflicted bodily harm upon \_\_\_\_\_).

[1] A firearm whether loaded or unloaded is a dangerous weapon.

[2] A "dangerous weapon" is anything designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid<sup>1</sup> or anything else that, in the manner used or intended to be used, is known to be capable<sup>2</sup> of producing death or great bodily harm, or any fire that is used to produce death or great bodily harm. "Great bodily harm" means bodily injury that creates a high

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**14.04**

<sup>1</sup>A flammable liquid is defined by statute to be: Class I flammable liquids as defined in section 9.108 of the Uniform Fire Code, but not intoxicating

liquor as defined in M.S.A. § 340.07. M.S.A. § 609.02, subd. 6.

<sup>2</sup>See Comment to CRIMJIG 13. 10.

probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body or other serious bodily harm.

[3] "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.245, subd. 1.

On the meaning of "force," see Comment to CRIMJIG 12.01.

This instruction was approved in *State v. Kvale*, 302 N.W.2d 650 (Minn. 1981).

In *State v. Seifert*, 256 N.W.2d 87 (Minn. 1977), the Supreme Court held that a .177 caliber BB pistol could qualify as a firearm or dangerous weapon for purposes of M.S.A. § 609.11 and M.S.A. § 609.245.

See also *State v. Baynes*, 279 Minn. 423, 157 N.W.2d 371 (1968); *State v. Johnson*, 277 Minn. 230, 152 N.W.2d 768 (1967), *cert. denied*, 390 U.S. 990, 88 S. Ct. 1190, 20 L.Ed.2d 1297 (1968).



**CRIMJIG 14.05****AGGRAVATED ROBBERY—SECOND DEGREE—  
DEFINED**

The statutes of Minnesota provide that whoever, knowing (he) (she) was not entitled to do so, takes personal property from another, either from the person or in the presence of the person, and uses or threatens to the imminent use of force against any person to over the person's resistance or powers of resistance to, or compel acquiescence in, the taking or carrying away of the property and implies by word or act possession of a dangerous weapon, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.245, subd. 2.

**CRIMJIG 14.06****AGGRAVATED ROBBERY—SECOND DEGREE—  
ELEMENTS**

The elements of aggravated robbery in the second degree are:

First, the defendant took \_\_\_\_\_ (from the person of) (or) (in the presence of) \_\_\_\_\_,

Second the defendant knew that (he) (she) was not entitled to take it.

Third, the defendant used (force) (or) (the threat of imminent force) against \_\_\_\_\_ to (overcome resistance) (or) (overcome the powers of resistance to) (or) (compel acquiescence in) the taking or carrying off of the \_\_\_\_\_. The term "threat of imminent force" means the intentional creation in \_\_\_\_\_'s mind of an understanding that if (he) (she) resisted or refused to cooperate, force would immediately be used against (him) (her).

Fourth, the defendant implied by word or act possession of a dangerous weapon.

[1] A firearm whether loaded or unloaded is a dangerous weapon.

[2] A "dangerous weapon" is anything designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid<sup>1</sup> or anything else that, in the manner used or intended to be used, is known to be capable<sup>2</sup> of producing death or great bodily harm, or any fire that is used to produce death or great bodily harm. "Great bodily harm" means bodily injury that creates a high probability of death, causes serious permanent disfigure-

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**14.06**

<sup>1</sup>A flammable liquid is defined by statute to be: Class I flammable liquids as defined in section 9.108 of the Uniform Fire Code, but not intoxicating

liquor as defined in M.S.A. § 340.07. M.S.A. § 609.01, subd. 6.

<sup>2</sup>See Comment to CRIMJIG 13.10.

ment, or causes a permanent or protracted loss or impairment of the function of any part of the body or other serious bodily harm.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[If each of these elements has been proven beyond a reasonable doubt, the defendant is guilty of aggravated robbery. If you find that any of the elements has not been proven beyond a reasonable doubt, the defendant is not guilty.]

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COMMENT

M.S.A. § 609.245, subd. 2.

On the meaning of "force," see CRIMJIG 12.01.

*See also State v. Baynes*, 279 Minn. 423, 157 N.W.2d 371 (1968); *State v. Johnson*, 277 Minn. 230, 152 N.W.2d 768 (1967), *cert. denied*, 390 U.S. 990, 88 S. Ct. 1190, 20 L.Ed.2d 1297 (1968).



## CHAPTER 15

# KIDNAPPING AND RELATED CRIMES

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## **CRIMJIG 15.01**

### **KIDNAPPING—DEFINED**

Under Minnesota law, whoever confines or removes from one place to another (any person without that person's consent) (any person under the age of 16 years without the consent of that person's parents or legal custodian) for the purpose of<sup>1</sup>

[1] holding the person for ransom or reward for release,

[2] holding the person as hostage or shield,

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#### **15.01**

<sup>1</sup>Note that M.S.A. § 609.02, subd. 9, (3) and (4) provide that "intentionally" and "with intent that" means that the actor "has a purpose to do the

thing or cause the result specified" thus meeting the mens rea requirement for a felony or gross misdemeanor.

[3] facilitating the commission of any felony or flight after a felony,

[4] committing great bodily harm or terrorizing that person (or another),

[5] holding the person in involuntary servitude,

is guilty of a crime.

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COMMENT

M.S.A. § 609.25

In *State v. Smith*, 669 N.W.2d 19 (Minn.2003), *overruled on other grounds*, *State v. Leake*, 699 N.W.2d 312 (Minn. 2005), the Supreme Court held that:

. . . (C)onfinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime, in order to justify a separate criminal sentence. Under our current sentencing scheme, convictions that solely rely on acts incidental to the commission of one crime—here confining [victim] in the course of murder—to constitute the elements of kidnapping (confinement) unduly exaggerate the criminality of the conduct. We conclude that where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping.

The court reiterated its holding in *State v. Welch*, 675 N.W.2d 615 (Minn. 2004), a case involving criminal sexual conduct in the second degree.

**CRIMJIG 15.02****KIDNAPPING—ELEMENTS**

The elements of kidnapping are:

[1] First, the defendant (confined \_\_\_\_\_) (or) (removed \_\_\_\_\_ from one place to another) without \_\_\_\_\_'s consent.

[2] First, \_\_\_\_\_ was a person who had not reached (his) (her) sixteenth birthday, and the defendant (confined \_\_\_\_\_ (him) (her)) (or) (removed \_\_\_\_\_ (him) (her) from one place to another) without the consent of (his) (her) parent(s) or legal custodian.

(To confine a person is to deprive the person of freedom. A physical restraint is not necessary; a person can restrain another by threats of force.) (To remove a person from one place to another is to cause the person to move from the place where the person was to another place. It is not necessary that the defendant have physically transported \_\_\_\_\_. It is sufficient if the removal was accomplished by the threat of force.)

[A] Second, the defendant acted for the purpose of holding \_\_\_\_\_ for ransom or reward for release. It is not necessary that the ransom or reward have been money. It is enough if the defendant intended to demand for the release of \_\_\_\_\_ anything to which the defendant was not lawfully entitled. It is not necessary that the defendant received the ransom or reward or even that the defendant made a demand, so long as the defendant intended to make such a demand.

[B] Second, the defendant acted for the purpose of holding \_\_\_\_\_ as a hostage or shield. A "hostage" is a person held in order to enforce a demand. A "shield" is a person held in order to prevent the person who is holding (him) (her) from being stopped, captured, wounded, or killed. It is not necessary that \_\_\_\_\_ was actually used as a hostage or shield, so long as the defendant intended to make such use of the person.

[C] Second, the defendant acted for the purpose of



facilitating the commission of the crime of \_\_\_\_\_,<sup>1</sup> or facilitating flight after the crime. It is not necessary that the crime or the flight actually took place, so long as the defendant intended to facilitate the crime or flight.

[D] Second, the defendant acted for the purpose of committing great bodily harm on the person of \_\_\_\_\_ or terrorizing \_\_\_\_\_. "Great bodily harm" means an injury to the body that creates a high probability of death, causes serious permanent disfigurement, causes a permanent or protracted loss or impairment of the function of any organ or member of the body, or causes other serious harm to the body. "Terrorizing a person" means causing extreme fear by use of violence or threats. It is not necessary that the defendant actually caused great bodily harm to \_\_\_\_\_ or have terrorized \_\_\_\_\_, so long as the defendant intended to do so.

[E] Second, the defendant acted for the purpose of holding \_\_\_\_\_ in involuntary servitude. "To hold a person in involuntary servitude" means to force the person to work or perform services without the person's consent. It is not necessary that the defendant actually forced \_\_\_\_\_ to work or perform services, so long as the defendant intended to make the person do so.

Third, some part of the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have [additional issues] [an additional issue] to determine and [it] [they] will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): [Was \_\_\_\_\_ released in a safe place? (A victim of kidnapping is released only if released with the

consent of the kidnapper. A victim who escapes is not released.) You will answer this question "yes" or "no." If you have a reasonable doubt as to the answer, you will answer the question "yes." [Did \_\_\_\_\_ suffer great bodily harm during the course of the kidnapping? "Great bodily harm" means an injury to the body that creates a high probability of death, causes serious permanent disfigurement, causes a permanent or protracted loss or impairment of the function of any organ or member of the body, or causes other serious harm to the body. You will answer this question "yes" or "no." If you have a reasonable doubt as to the answer, you will answer the question "no."] [Was \_\_\_\_\_ under the age of sixteen years? You will answer the question "yes" or "no." If you have a reasonable doubt as to the answer, you will answer the question "no."]

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COMMENT

M.S.A. § 609.25.

The phrase "remove from one place to another" includes the taking of the victim out of the State or bringing into the State. Criminal Code Advisory Committee Comment.

The definition of "terrorizing" comes from *State v. Franks*, 765 N.W.2d 68 (Minn. 2009). See also *State v. Shweppe*, 237 N.W.2d 609 (Minn. 1975).

False imprisonment is a lesser offense of kidnapping. *State v. Keenan*, 289 Minn. 313, 184 N.W.2d 410 (1971).

In *State v. Alladin*, 408 N.W.2d 642 (Minn. App. 1987), the Court of Appeals held that the intentional confinement of a minor child by the noncustodial parent for purposes of using the child as a shield or hostage without the consent of the custodial parent constituted kidnapping.

See also *State v. Watts*, 296 Minn. 354, 208 N.W.2d 748 (1973); *State v. Morris*, 281 Minn. 119, 160 N.W.2d 715 (1968).

**CRIMJIG 15.03****FALSE IMPRISONMENT—DEFINED**

Under Minnesota law, whoever, knowing (he) (she) has no lawful authority to do so, intentionally confines or restrains (any person without that person's consent) (any person under the age of 18 years not (his) (her) own child without the consent of that person's parent or legal custodian), is guilty of a crime.

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**COMMENT**

M.S.A. § 609.255 subd. 2.



**CRIMJIG 15.04****FALSE IMPRISONMENT—ELEMENTS**

The elements of false imprisonment are:

First, the defendant intentionally confined or restrained \_\_\_\_\_. To “confine or restrain” a person is to deprive a person of the freedom to go where the person pleases and is lawfully entitled to go, or to leave the place where the person is. The restraint or confinement may include the use of physical barriers, the use of physical force, or the threat of the immediate use of physical force if the person confined or restrained reasonably believes that the person making the threat has the ability to carry out the threat.

Second, the defendant knew that (he) (she) had no lawful authority to confine or restrain \_\_\_\_\_. If the defendant reasonably believed that (he) (she) had such authority, this element has not been proven.

[1] Third, \_\_\_\_\_ did not consent to the confinement or restraint.

[2] Third, \_\_\_\_\_ was a child, not the defendant’s own, who had not reached (his) (her) eighteenth birthday, and (the parent(s) of \_\_\_\_\_) (\_\_\_\_\_, the legal custodian of \_\_\_\_\_) did not consent to the confinement or restraint.

Fourth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 15.05****DEPRIVING ANOTHER OF CUSTODIAL OR  
PARENTAL RIGHTS—TAKING, DETAINING OR  
FAILING TO RETURN A CHILD—DEFINED**

**Under Minnesota law, whoever intentionally**

**[1] conceals a minor child from the child's parent, where such action manifests an intent to substantially deprive the parent of parental rights**

**[2] conceals a minor child from another person having the right to parenting time or custody, where the action manifests an intent to substantially deprive that person of rights to parenting time or custody**

**[3] takes, obtains, retains, or fails to return a minor child in violation of a court order that has transferred legal custody of the child to the Commissioner of Human Services, a child placing agency, or local social services agency**

**[4] takes, obtains, retains, or fails to return a minor child from or to the parent, where the action manifests an intent to substantially deprive that parent the right to parenting time or custody,**

**[5] takes, obtains, retains, or fails to return a minor child from or to a parent after commencement of an action relating to child parenting time or custody prior to an issuance of an order determining custody or parenting time rights, where the action manifests an intent to substantially deprive the parent of parental rights,**

**[6] retains a child in this State with the knowledge that the child was removed from another State when the defendant knew that \_\_\_\_\_,<sup>1</sup>**

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**15.05**

§ 609.26, subd. 1(1) to (4).

<sup>1</sup>An act prohibited by M.S.A.

is guilty of a crime.

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COMMENT

M.S.A. § 609.26, subd. 1.

In *State v. Andow*, 386 N.W.2d 230 (Minn. 1986), the Supreme Court held that a violation of M.S.A. § 609.26 is a felony offense from day one of the offense, without regard to the fourteen day “grace” period for voluntary return of the child.

In *State v. Niska*, 499 N.W.2d 820 (Minn. App. 1993), *affirmed in part, reversed in part*, 514 N.W.2d 260 (Minn. 1994), the Court of Appeals held that an adjudication of paternity under the Parentage Act is not an essential element to establish a parent-child relationship, for purposes of prosecution for a violation of M.S.A. § 609.26. The Court held that existence of the relationship could be established in a case where the putative father is named as father on the birth certificate, had held himself out as the child’s father, had signed a declaration of paternity, and acknowledged his paternity in a sworn deposition.



**CRIMJIG 15.06****DEPRIVING ANOTHER OF CUSTODIAL OR PARENTAL RIGHTS TAKING, DETAINING OR FAILING TO RETURN A CHILD—ELEMENTS**

The elements of the crime are:

[1] First, the defendant intentionally concealed \_\_\_\_\_ from \_\_\_\_\_'s parent(s).

Second, that action manifested an intent to substantially deprive that parent of (his) (her) parental rights.

[2] First, the defendant intentionally concealed \_\_\_\_\_ from another person having the right to parenting time or custody.

Second, that action manifested an intent to substantially deprive that person of rights to parenting time or custody.

[3] First, the defendant intentionally (took) (obtained) (retained) (failed to return) \_\_\_\_\_ in violation of a court order that had transferred legal custody of \_\_\_\_\_ to (the Commissioner of Human Services) (a child placing agency) (the county welfare board).

[4] First, the defendant intentionally (took) (obtained) (retained) (failed to return) \_\_\_\_\_ from or to the parent in violation of a court order.

Second, such action manifested an intent to substantially deprive that parent of (his) (her) rights to parenting time or custody.

[5] First, the defendant intentionally (took) (obtained) (retained) (failed to return) \_\_\_\_\_ from or to a parent after a legal action relating to child parenting time or custody had been commenced, but prior to the issuance of an order determining custody or parenting time.

Second, such action manifested an intent to substantially deprive the parent of (his) (her) parental rights.

[6] First, the defendant intentionally retained \_\_\_\_\_ in this State.

Second, the defendant knew that \_\_\_\_\_ was removed from another State when \_\_\_\_\_.<sup>1</sup>

[Second] [Third], \_\_\_\_\_ was under the age of 18 at the time of the defendant's act.

[Fourth] [Fifth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County (or) \_\_\_\_\_ County was the county of lawful residence of \_\_\_\_\_.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you will have (an) additional question(s), and (it) (they) will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (is) (are):

[1] Did the defendant possess a dangerous weapon while committing the act? [A firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon.] [A "dangerous weapon" is anything designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid<sup>2</sup> or anything else that, in the manner used or intended to be used, is known to be capable<sup>3</sup> of producing death or great bodily harm, or any fire that is used to produce death or great bodily harm.]

#### 15.06

<sup>1</sup>In violation of M.S.A. § 609.26, subd. 1(1) to (4). The language of options (1) to (4) should be modified appropriately.

<sup>2</sup>A flammable liquid is defined by 10.

statute to be: Class I flammable liquids as defined in section 9.108 of the Uniform Fire Code, but not intoxicating liquor as defined in M.S.A. § 340.07. M.S.A. § 609.01, subd. 6.

<sup>3</sup>See Comment to CRIMJIG 13.

[2] Did the defendant cause substantial bodily harm to effect the taking? "Substantial bodily harm" means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.

[3] Did the defendant abuse or neglect \_\_\_\_\_ during the concealment, detention, or removal of \_\_\_\_\_?

[4] Did the defendant inflict or threaten to inflict physical harm on a (parent) (lawful custodian) of \_\_\_\_\_ or on \_\_\_\_\_ with intent to cause the (parent) (lawful custodian) to discontinue criminal prosecution?

[5] Did the defendant demand payment in exchange for return of \_\_\_\_\_, or demand to be relieved of the financial or legal obligation to support \_\_\_\_\_ in exchange for \_\_\_\_\_'s return?

[6] Has the defendant previously been convicted of depriving another of custodial or parental rights?

You will answer the question(s) "yes" or "no." If you have a reasonable doubt as to the answer, you should answer "no."

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COMMENT

M.S.A. § 609.26, subd. 1.



**CRIMJIG 15.07****DEPRIVING ANOTHER OF CUSTODIAL OR  
PARENTAL RIGHTS—DEFENSES**

The defendant has been charged with detaining, taking, or failing to return a child. It is a defense to this charge if:

- [1] the defendant reasonably believed the action taken was necessary to protect the child from physical or sexual assault or substantial emotional harm.
- [2] the defendant reasonably believed the action taken was necessary to protect the defendant from physical or sexual assault.
- [3] the action taken was consented to by the parent, step-parent, or legal custodian of the child. Consent to custody or specific visitation is not consent to the act of failing to return or concealing the child.
- [4] the action taken was authorized by an order from the court issued before the defendant took action to conceal the child.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in such circumstances and with such intent.

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**COMMENT**

M.S.A. § 609.26, subd. 2.

**CRIMJIG 15.08****DEPRIVING ANOTHER OF PARENTAL OR  
CUSTODIAL RIGHTS AT LEAST 18 AND MORE  
THAN 24 MONTHS OLDER THAN CHILD—DEFINED**

**Under Minnesota law, whoever**

**[1] is at least 18 years old and more than 24 months older than a child and refuses to return a minor child to a parent or lawful custodian,**

**[2] is at least 18 years old and more than 24 months older than a child and causes or contributes to a child being a habitual truant,**

**[3] is at least 18 years old and more than 24 months older than a child and causes or contributes to a child being a runaway,**

**[4] is at least 18 years old and resides with a minor under the age of 16 without the consent of the minor's parent or lawful guardian,**

**is guilty of a crime.**

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**COMMENT**

**M.S.A. § 609.26, subd. 1(6), (7), (8), and (9).**

**CRIMJIG 15.09****DEPRIVING ANOTHER OF PARENTAL OR  
CUSTODIAL RIGHTS AT LEAST 18 AND MORE  
THAN 24 MONTHS OLDER THAN CHILD—  
ELEMENTS**

The elements of deprivation of parental rights are:

First, the defendant was at least 18 years old.

Second, the defendant was more than 24 months older than \_\_\_\_\_.<sup>1</sup>

[1] Third, the defendant refused to return \_\_\_\_\_ to \_\_\_\_\_'s parent or lawful custodian.

[2] Third, the defendant caused or contributed to \_\_\_\_\_ being a habitual truant. A "habitual truant" is a child under the age of 16 who is absent from attendance at school without lawful excuse for seven school days if the child is in elementary school, or for one or more class periods on seven school days if the child is in middle school, junior high school, or high school.

[3] Third, the defendant caused or contributed to \_\_\_\_\_ being a runaway. A "runaway" means an unmarried child under the age of 18 years who is absent from the home of a parent or other lawful placement without consent of the parent, guardian, or lawful custodian.

[4] Third, the defendant resided with \_\_\_\_\_ without the consent of \_\_\_\_\_'s parent or lawful custodian.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven be-

**15.09**

<sup>1</sup>M.S.A. § 609.26, subd. 1(9) requires that the child be under sixteen years of age. Because in almost every case this age factor is simply a matter

of mathematics, in light of the requirements of the first element that the defendant be at least eighteen, the Committee has structured the second element in this simplified manner.



yond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.26, subd. 1(6), (7), (8), and (9).

See also M.S.A. § 260C.007, subd. 6 and Minn. R. Juv. Prot. 2.01.

## B. PROPERTY CRIMES

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### CHAPTER 16

## THEFT AND RELATED OFFENSES

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**CRIMJIG 16.01****THEFT—TAKING PROPERTY OF ANOTHER—  
DEFINED**

**Under Minnesota law, whoever intentionally and without**

claim of right (takes) (uses) (transfers) (conceals) (retains) possession of movable property of another without the other's consent and with intent to permanently deprive the owner of possession of the property, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(1).

**CRIMJIG 16.02****THEFT—TAKING PROPERTY OF ANOTHER—  
ELEMENTS**

The elements of theft are:

First, the \_\_\_\_\_ alleged to have been (taken) (used) (transferred) (concealed) (retained) was the property of (\_\_\_\_\_) (a person other than the defendant).

Second, the defendant intentionally (took) (used) (transferred) (concealed) (retained) the \_\_\_\_\_. This means that the defendant (took) (used) (transferred) (concealed) (retained) the \_\_\_\_\_ on purpose, and that the defendant knew or believed that it was the property of another person. [“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result.<sup>1</sup>]

Third, the defendant knew or believed that (he) (she) had no right to take the \_\_\_\_\_.

Fourth, (\_\_\_\_\_) (the owner of the \_\_\_\_\_) did not consent to the defendant’s taking it.

Fifth, the defendant intended to deprive the owner permanently of the possession of the \_\_\_\_\_ (or believed that the act would deprive the owner permanently of possession).

Sixth, the defendant’s act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



## COMMENT

See CRIMJIG 16.76 to 16.83 for issues of value and nature of the property.

In *State v. Gage*, 272 Minn. 106, 136 N.W.2d 662 (1965), the Supreme Court held that a defendant did not intend to deprive the owner of possession if the defendant believed the owner abandoned the property.

In *State v. Fernow*, 354 N.W.2d 438 (Minn. 1984), the Supreme Court held that the trial court should have instructed the jury in a manner consistent with this instruction, but failure to do so in that case was not prejudicial error.

**CRIMJIG 16.03****THEFT—TAKING FROM PERSON WITH SUPERIOR  
RIGHT OF POSSESSION—DEFINED**

Under Minnesota law, whoever, with or without a legal interest in movable property, takes such property out of the possession of a person having a superior right of possession to the property, without the other's consent and with intent to deprive the other permanently of possession of the property, is guilty of a crime.

---

**COMMENT**

M.S.A. § 609.52, subd. 2(2).

**CRIMJIG 16.04****THEFT—TAKING FROM PERSON WITH SUPERIOR  
RIGHT OF POSSESSION—ELEMENTS**

The elements of theft are:

First, the defendant (had) (did not have) a legal interest in the \_\_\_\_\_. (The defendant may have been the owner or may have had some other legal interest.)

Second, (the property) (the \_\_\_\_\_) was in the possession of \_\_\_\_\_.

Third, the defendant took it from \_\_\_\_\_'s possession.

Fourth, \_\_\_\_\_ had a right to possess the \_\_\_\_\_ that was superior to the defendant's right. (The State has offered evidence that the defendant had given possession of the \_\_\_\_\_ to \_\_\_\_\_ as security for a loan. If you find that the State has proven this beyond a reasonable doubt, then \_\_\_\_\_ had a right of possession superior to that of the defendant.)<sup>1</sup>

Fifth, \_\_\_\_\_ did not consent to the defendant's taking possession of the property.

Sixth, the defendant intended to deprive \_\_\_\_\_ permanently of the possession of the \_\_\_\_\_ (or believed that the act would deprive \_\_\_\_\_ permanently of possession).<sup>2</sup>

Seventh, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find \_\_\_\_\_

**16.04**

<sup>1</sup>The question whether one right is superior to another is one of law, and for the court to decide. The question whether a particular relationship existed involves a question of fact. The judge should formulate an instruction,

similar to the parenthetical here.

<sup>2</sup>When temporary control equivalent to permanent deprivation under M.S.A. § 609.52, subd. 2(5), is alleged, CRIMJIG 16.80 should be added to the sixth element.



that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.52, subd. 2(2).

See CRIMJIG 16.76 to 16.83 for issues of value and nature of the property.

See *State v. Simion*, 745 N.W.2d 830 at 842, for a discussion of superior right of possession.

**CRIMJIG 16.05****THEFT—DECEPTION BY FALSE  
REPRESENTATION (INCLUDING THEFT BY  
CHECK)—DEFINED**

Under Minnesota law, whoever obtains for (himself) (herself) (or another) the possession, custody, or title to property of another person by intentionally deceiving the other with a false representation that is known to (him) (her) to be false, is made with intent to defraud, and does defraud the person to whom it is made, is guilty of a crime.

A false representation includes

- [1] the issuance of a (check) (draft) (order for the payment of money or delivery of property) by one who knows (he) (she) is not entitled to issue it.
- [2] a promise made with intent not to perform.
- [3] the preparation or filing of a claim for reimbursement, a rate application, or a cost report used to establish a rate or claim for payment for medical care provided to a recipient of medical assistance that intentionally and falsely states the costs of or actual services provided by a vendor of medical care.

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**COMMENT**

M.S.A. § 609.52, subd. 2(3).

**CRIMJIG 16.06****THEFT—DECEPTION BY FALSE  
REPRESENTATION (INCLUDING THEFT BY  
CHECK)—ELEMENTS**

The elements of theft are:

First, the defendant obtained the (possession) (custody) (title) of \_\_\_\_\_.

Second, \_\_\_\_\_ was the property of (\_\_\_\_\_) (another).

[1] Third, the defendant intentionally made a representation to \_\_\_\_\_ in order to obtain the \_\_\_\_\_. This means that the defendant made the representation for the purpose of obtaining the \_\_\_\_\_.

Fourth, the defendant knew or believed that the representation was false.

Fifth, the defendant intended that \_\_\_\_\_ believe the representation to be true.

Sixth, \_\_\_\_\_ believed the representation true and, in reliance on that representation, gave the defendant (possession) (custody) (title) to the \_\_\_\_\_.

[2] Third, the defendant intentionally issued a (check) (\_\_\_\_\_) to \_\_\_\_\_ in order to obtain the \_\_\_\_\_.

Fourth, the defendant knew or believed that (he) (she) was not entitled to issue such a (check) (\_\_\_\_\_),

Fifth, at the time of issuing the (check) (\_\_\_\_\_), the defendant intended to defraud \_\_\_\_\_ by intending that the check never be paid,.

Sixth, the defendant intended that \_\_\_\_\_ be permanently deprived of the property.



Seventh, the defendant intended that \_\_\_\_\_ believe that the defendant was entitled to issue the (check) (\_\_\_\_\_).

Eighth, \_\_\_\_\_ believed that the defendant was entitled to issue such a (check) (\_\_\_\_\_) and, in reliance on such (check) (\_\_\_\_\_), gave the defendant (possession) (custody) (title) of the \_\_\_\_\_.

[3] Third, the defendant intentionally made a promise to \_\_\_\_\_ to \_\_\_\_\_<sup>1</sup> in order to obtain the \_\_\_\_\_.

Fourth, the defendant intended at the time (he) (she) made the promise that (he) (she) would not perform the promise. In order to find that the defendant did not intend to perform the promise, it is not enough that you find that it was not performed; failure to perform is not evidence of intent not to perform unless corroborated by other substantial evidence.

Fifth, the defendant intended that \_\_\_\_\_ believe that the defendant intended to perform the promise.

Sixth, \_\_\_\_\_ believed that the defendant intended to perform the promise and, in reliance on such promise, gave the defendant (possession) (custody) (title) of the \_\_\_\_\_.

[4] Third, the defendant intentionally prepared or filed a (claim for reimbursement) (rate application) (cost report) used to establish a rate or claim for payment for medical care provided to a recipient of medical assistance.

Fourth, the defendant knew that the (claim for reimbursement) (rate application) (cost report) falsely stated the costs of or other actual services provided by (\_\_\_\_\_) (the vendor of medical care).

Fifth, the defendant intended that \_\_\_\_\_ believe that the (claim for reimbursement) (rate application) (cost report) was true.

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16.06

promised.

<sup>1</sup>The action alleged to have been

Sixth, \_\_\_\_\_ believed that the (claim for reimbursement) (rate application) (cost report) was true

Seventh, \_\_\_\_\_ in reliance on the (claim for reimbursement) (rate application) (cost report), gave the defendant \_\_\_\_\_.

[Seventh] [Eighth] [Ninth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

For cases involving forgery, see CRIMJIG Chapter 19.

See CRIMJIG 16.76 to 16.83 for issues of value and the nature of the property.

In *State v. Roden*, 380 N.W.2d 520 (Minn. App. 1986), *affirmed as modified*, 384 N.W.2d 456 (Minn. 1986), the Court of Appeals approved an instruction patterned after CRIMJIG 16.06.

If a violation of M.S.A. § 609.535 is alleged, CRIMJIGs 16.07 and 16.08 should be given instead.

**CRIMJIG 16.07****THEFT—ISSUANCE OF WORTHLESS CHECK—  
DEFINED**

Under Minnesota law, whoever issues any check (or draft, order of withdrawal, or similar negotiable or nonnegotiable instrument) that, at the time of issuance, the issuer intends shall not be paid, is guilty of a crime.<sup>1</sup>

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**COMMENT**

M.S.A. § 609.535, subd. 2.

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**16.07**

<sup>1</sup>Note that under M.S.A. § 609.535, subd. 5, this statute does

not apply to a post-dated check or to a check given for a past consideration.



**CRIMJIG 16.08****THEFT—ISSUANCE OF WORTHLESS CHECK—  
ELEMENTS**

The elements of issuing a worthless check are:

First, the defendant issued (a) check(s) (or draft, order of withdrawal or similar negotiable or nonnegotiable instrument) to \_\_\_\_\_ in payment for goods or services.

Second, the defendant intended at the time of issuing the check(s) (or draft, order of withdrawal, or similar negotiable or nonnegotiable instrument) that (it) (they) would not be paid.

In determining whether the requirement of intent has been proven beyond a reasonable doubt, you should consider all the evidence of intent. The law allows, but does not require, you to find such an intent from proof beyond a reasonable doubt of the following:

[1] the defendant, at the time of issuing the check(s) (or draft, order of withdrawal, or similar negotiable or nonnegotiable instrument), did not have an account with the bank (or drawee) the check (or order) was drawn on.

[2] the defendant, at the time of issuance, did not have sufficient funds or credit with the bank (or drawee) and did not pay the check (or draft, order of withdrawal, or similar negotiable or nonnegotiable instrument) within five business days after mailing of notice by certified or regular mail, supported by an affidavit of service or mailing, to the address printed on the check(s), that the check(s) (or draft, order of withdrawal, or similar negotiable or nonnegotiable instrument) was not paid.

[3] the check(s) (or draft, order of withdrawal, or similar negotiable or nonnegotiable instrument) having been presented to the bank (or drawee) within a reasonable time after (it was) (they were) issued, the defendant did not have sufficient funds or credit with the bank (or drawee) and did not pay the check(s) (or draft, order of withdrawal, or nego-

tiable or nonnegotiable instrument) within five business days of receiving notice by certified or regular mail, supported by an affidavit of service of mailing to the address printed on the check(s), that the check(s) (or draft, order of withdrawal, or similar negotiable or nonnegotiable instrument) had not been paid.

Third, the defendant's act(s) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: Was the (value of the dishonored check) (total value of the dishonored checks within a six month period) more than \$250.00? If you have a reasonable doubt as to the value of the check(s), you should answer "no."

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#### COMMENT

M.S.A. § 609.535.

Note that § 609.535 does not apply to a post-dated check or to a check given for a past consideration. M.S.A. § 609.535, subd. 5.

In *State v. Roden*, 384 N.W.2d 456 (Minn. 1986), the Supreme Court held that the crime of issuance of a worthless check is necessarily a lesser included offense of the crime of theft by check.

An instruction on the element of intent not to pay that directs the jury to find the presumed fact of intent from basic facts without qualifying instructions that permit the jury to weigh evidence introduced by the defendant to rebut that presumption, or that permits the jury to disregard the presumption, creates a constitutionally impermissible mandatory presumption. *State v. Williams*, 324 N.W.2d 154 (Minn. 1982).

## CRIMJIG 16.09

### THEFT—SWINDLE—DEFINED

Under Minnesota law, whoever obtains property or services from another person by swindling, whether by artifice, trick, or device, is guilty of a crime.

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#### COMMENT

M.S.A. § 609.52, subd. 2(4).



## CRIMJIG 16.10

### THEFT—SWINDLE—ELEMENTS

The elements of theft by swindle are:

First, \_\_\_\_\_ (the owner of the property) [gave up (possession) (custody) (title) of (\_\_\_\_\_)] [provided services] to the defendant (or another) because of the swindle.

Second, the defendant acted with the intention of obtaining for (himself) (herself) (another) the (possession) (custody) (title) of (\_\_\_\_\_) (services of \_\_\_\_\_).

Third, the defendant's act was a swindle. The essence of a swindle is the cheating of another person by a deliberate artifice or scheme. It is not necessary that \_\_\_\_\_ had a special confidence in the defendant. A swindle can be accomplished by false representation as to either past or future facts. A swindle may include a trick or a scheme consisting of mere words and actions, and it does not require the use of some mechanical or other device.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

---

#### COMMENT

M.S.A. § 609.52, subd. 2(4).

The statute is intended to protect the gullible, as well as persons of ordinary prudence. *State v. Hanson*, 285 N.W.2d 483 (Minn. 1979).

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

In *State v. Lone*, 361 N.W.2d 854 (Minn. 1985), the Supreme Court affirmed a conviction in which the defendant contended that his

representations were merely “puffing” the value of his product, and that he could not be convicted of theft by swindle if his customers received something of value. The Supreme Court upheld the jury instruction used in that case.

*See also State v. Ruffin*, 280 Minn. 126, 158 N.W.2d 202 (1968); *State v. Hodge*, 266 Minn. 193, 123 N.W.2d 323 (1963); *State v. Wells*, 265 Minn. 212, 121 N.W.2d 68 (1963); *State v. Cunningham*, 257 Minn. 31, 99 N.W.2d 908 (1959).

**CRIMJIG 16.11****THEFT—LOST PROPERTY—DEFINED**

Under Minnesota law, whoever finds lost property, and knowing or having reasonable means of ascertaining the true owner, appropriates the lost property to (his) (her) own use (or that of another) without first having made a reasonable effort to find the owner and return the property to the owner, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(6).



## CRIMJIG 16.12

### THEFT—LOST PROPERTY—ELEMENTS

The elements of theft are:

First, the defendant appropriated \_\_\_\_\_, the property of (\_\_\_\_\_) (another person). If (\_\_\_\_\_) (the owner) discarded the \_\_\_\_\_, intending to abandon all claim or interest in it, the \_\_\_\_\_ was not \_\_\_\_\_'s property.

Second, the defendant knew or believed that the \_\_\_\_\_ was the property of another.

Third, the defendant knew the identity of the owner or knew that by reasonable means (he) (she) could discover the identity of the owner.

Fourth, the defendant failed to make a reasonable effort to find the owner and to (return) (offer and surrender<sup>1</sup>) the \_\_\_\_\_ to the owner.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 609.52, subd. 2(6).

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

A person is not entitled by law to insist that a reward be paid for the return of lost property or to withhold the return of such property

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#### 16.12

<sup>1</sup>Although the committee believes the term "return" is a sufficient

plain-language explanation of what is required, "offer and surrender" is the phrase used in the statute.

unless a reward is given. If the elements of the crime of theft have been proven, it is no defense that the defendant offered to return the property for a reward. *State v. Simonson*, 298 Minn. 235, 214 N.W.2d 679 (1974).

**CRIMJIG 16.13****THEFT—VENDING MACHINE—DEFINED**

Under Minnesota law, whoever intentionally obtains property or services, offered upon the deposit of money in a (coin or token operated machine) (vending machine) (other receptacle) without making the required deposit or otherwise obtaining the consent of the owner, is guilty of a crime.

---

**COMMENT**

M.S.A. § 609.52, subd. 2(7).



**CRIMJIG 16.14****THEFT—VENDING MACHINE—ELEMENTS**

The elements of theft are:

First, the \_\_\_\_\_ alleged to have been obtained by the defendant was available upon the deposit of money or tokens in (a coin or token operated machine) (a vending machine) (another receptacle).

Second, the defendant intentionally obtained the \_\_\_\_\_ without making the required deposit. This means that the defendant acted with the purpose of obtaining the \_\_\_\_\_ without making the required deposit, and that the defendant knew or believed that the \_\_\_\_\_ was offered only on the condition that the deposit be made. (The defendant did not make the required deposit if the defendant knowingly used counterfeit money or token, or a slug.)

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

---

**COMMENT**

M.S.A. § 609.52, subd. 2(7).

See CRIMJIGs 16.77 to 16.83 for issues of value and nature of the property.

**CRIMJIG 16.15****THEFT—LEASED PERSONAL PROPERTY—  
DEFINED**

Under Minnesota law, whoever rents or leases personal property from another under a written instrument and,

[1] with intent to place such property beyond the control of the lessor, conceals (or aids and abets the concealment of) such property,

[2] with intent to deprive the lessor of possession, sells, conveys, or encumbers such property without the consent of the lessor and without informing the person to whom the defendant sells, conveys, or encumbers the property that it is subject to a (lease) (rental contract),

[3] with intent to wrongfully deprive the lessor of possession, does not return the property to the lessor at the end of the (lease) (rental term) (plus agreed upon extensions),

[4] with intent to wrongfully deprive the lessor of the agreed upon charges, returns the property to the lessor at the end of the (lease) (rental term) (plus agreed upon extensions) but does not pay the charges agreed upon in the written instrument,

is guilty of a crime.

---

**COMMENT**

M.S.A. § 609.52, subd. 2(9).

**CRIMJIG 16.16****THEFT—LEASED PERSONAL PROPERTY—  
ELEMENTS**

The elements of theft are:

First, the defendant rented \_\_\_\_\_ from \_\_\_\_\_ under a written instrument.

[1] Second, the defendant concealed the \_\_\_\_\_.

Third, the defendant intended to place the \_\_\_\_\_ beyond the control of \_\_\_\_\_ (the lessor).

[2] Second, the defendant (sold) (conveyed) (encumbered)<sup>1</sup> the \_\_\_\_\_ to (\_\_\_\_\_) (another person) without the consent of \_\_\_\_\_ (the lessor) and without informing (\_\_\_\_\_)<sup>2</sup> (the other person) of the (lease) (rental contract).

Third, the defendant intended to deprive \_\_\_\_\_ (the lessor) of possession of the property.

[3] Second, the defendant did not return the property to \_\_\_\_\_ (the lessor) at the end of the (lease) (rental term) (plus agreed upon extensions).

Third, the defendant acted with intent to wrongfully deprive \_\_\_\_\_ (the lessor) of possession of the property.

[4] Second, the defendant returned the property to \_\_\_\_\_ (the lessor) at the end of the (lease) (rental term) (plus agreed upon extensions) but did not pay the charges agreed upon in the written instrument.

Third, the defendant acted with intent to wrongfully deprive \_\_\_\_\_ (the lessor) of the agreed upon charges.

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**16.16**

<sup>1</sup>Since the jury is not likely to be familiar with the terminology or law of security, when the creation of an encumbrance is charged, it is advis-

able to use a more familiar term, such as "pawned," "mortgaged," etc.

<sup>2</sup>The person to whom the property is alleged to have been sold, conveyed, or encumbered.



Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

\_\_\_\_\_  
COMMENT

M.S.A. § 609.52, subd. 2(9).

The statute provides that use of a false or fictitious name or address in obtaining the property, or a failure to return the property within five days after a written demand, is evidence of an intention to place the property beyond the control of the lessor or to deprive the lessor of possession. Ordinarily, instructions as to permissible inferences should not be given to the jury. It is left to the attorneys to argue permissible inferences.

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

Concealing is not limited to hiding or secreting. It includes conduct that renders its discovery by its owner more difficult. *State v. Simonson*, 298 Minn. 235, 214 N.W.2d 679 (1974); *State v. Carter*, 293 Minn. 102, 196 N.W.2d 607 (1972).

**CRIMJIG 16.17****THEFT—ALTERATION OF OWNER'S  
IDENTIFICATION—DEFINED**

Under Minnesota law, whoever, with the intent to prevent identification, alters, removes, or obliterates numbers or symbols placed on movable property for the purpose of identification by the owner or person with legal custody or right to possession, is guilty of a crime, unless the person is the owner or has the permission of the owner.

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**COMMENT**

M.S.A. § 609.52, subd. 2(10).

**CRIMJIG 16.18****THEFT—ALTERATION OF OWNER'S  
IDENTIFICATION—ELEMENTS**

The elements of theft are:

First, the defendant altered, removed, or obliterated numbers or symbols placed on \_\_\_\_\_.

Second, the numbers or symbols were placed on \_\_\_\_\_ by (an) (a) (owner) (person with legal custody) (person with right to possession) for the purpose of identifying the \_\_\_\_\_ as (his) (her) (or in (his) (her) custody).

Third, the defendant acted with the intent of preventing identification of the \_\_\_\_\_.

Fourth, the defendant was not the owner of the \_\_\_\_\_ or did not have the permission of the owner to make the alteration, removal, or obliteration.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.52, subd. 2(10).

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.



**CRIMJIG 16.19****THEFT—ALTERATION OR REMOVAL OF SERIAL  
AND IDENTIFICATION NUMBERS—DEFINED**

The statutes of Minnesota provide that whoever, with the intent to prevent identification of property so as to deprive the rightful owner of possession,

[1] alters or removes any (permanent serial number) (permanent distinguishing number) (manufacturer's identification number) on personal property,

[2] possesses, sells, or buys any personal property with knowledge that a (permanent serial number) (permanent distinguishing number) (manufacturer's identification number) has been removed or altered,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(11).

**CRIMJIG 16.20****THEFT—ALTERATION OR REMOVAL OF SERIAL  
AND IDENTIFICATION NUMBERS—ELEMENTS**

The elements of theft are:

[1] First, the defendant altered or removed a (permanent serial number) (permanent distinguishing number) (manufacturer's identification number) on \_\_\_\_\_.

[2] First, the defendant (possessed) (sold) (bought) \_\_\_\_\_.

Second, the defendant knew that a (permanent serial number) (permanent distinguishing number) (manufacturer's identification number) on the \_\_\_\_\_ had been removed or altered.

(Second) (Third), the defendant intended to prevent identification of \_\_\_\_\_ in order to deprive the rightful owner of its possession.

(Third) (Fourth), the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.52, subd. 2(11)

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

**CRIMJIG 16.21****THEFT—MOTOR VEHICLE—DEFINED**

Under Minnesota law, whoever takes or drives a motor vehicle without the consent of the (owner) (authorized agent of the owner), knowing or having reason to know that the (owner) (authorized agent of the owner) did not give consent, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(17).



**CRIMJIG 16.22**

**THEFT—MOTOR VEHICLE—ELEMENTS**

The elements of theft of a motor vehicle are:

First, the defendant took or drove a motor vehicle.<sup>1</sup>

Second, the (owner) (authorized agent of the owner) did not give the defendant consent to take or drive the motor vehicle.

Third, at the time the defendant took or drove the motor vehicle, the defendant knew, or had reason to know, that the (owner) (authorized agent of the owner) did not give consent.

Fourth, defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, defendant is not guilty.

**16.22**

<sup>1</sup>A motor vehicle is a self-propelled device for moving persons or property or pulling implements from

one place to another, whether the device is operated on land, rails, or water or in the air. See M.S.A. § 609.52, subd. 1(10).

**CRIMJIG 16.23****MOTOR VEHICLE TAMPERING—DEFINED**

Under Minnesota law, whoever intentionally, without the permission of the owner,

[1] rides (in) (upon) a motor vehicle knowing it was taken and is being driven by another without the permission of the owner,

[2] tampers with a motor vehicle,

[3] enters (into) (on) a motor vehicle,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.546.

**CRIMJIG 16.24****MOTOR VEHICLE TAMPERING—ELEMENTS**

The elements of motor vehicle tampering are:

First, the defendant intentionally

[1] rode (in) (upon) a motor vehicle knowing it was taken and was being driven by another without the permission of the owner.

[2] tampered with a motor vehicle. "To tamper with" means to make objectionable or unauthorized changes or to interfere with improperly.<sup>1</sup>

[3] entered (into) (on) a motor vehicle.

Second, the defendant acted without the permission of the owner.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

If an issue arises as to what constitutes a "motor vehicle," the jury should be instructed that:

A "motor vehicle" is any self-propelled device for moving persons or

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**16.24**

<sup>1</sup>See *State v. Wood*, 266 S.W.2d 632 (Mo. 1954) regarding definition of "tampering." Other courts have adopted similar definitions of the word "tampering." See, e.g., *Edwards v. Hartford*, 139 A.2d 599 (Conn. 1958);

*State v. Arnett*, 168 N.W.2d 807 (Iowa 1969); and *Harris v. Seiavitch*, 9 A.2d 375 (Pa. 1939). In *State v. Hale*, 463 S.W.2d 869 (Mo. 1971), the Court approved a definition of "tampering" that was simply "improper influence."



property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air. M.S.A. § 609.52, subd. 1(10).

Although the Minnesota Supreme Court has not answered the question of whether “permission” within the meaning of the tampering statute includes implied consent, the court in *Zuber v. Clarkson Const. Co.*, 315 S.W.2d 727 (Mo. 1958) held that it does not. However, this matter must be considered on a case-by-case basis, because there could arguably be some situations where the court might conclude that the jury should be instructed as to implied consent based upon a previous course of conduct.

Similarly, there is no authority as to whether the State must prove the defendant acted without the permission of the person in whose care and custody the vehicle has been placed, when the owner gave no such permission. At least one court has held that it is sufficient to establish that the owner had never given the defendant permission to tamper with the vehicle. *State v. Williams*, 567 S.W.2d 714 (Mo. App. 1978). See *State v. Brown*, 372 N.W.2d 53 (Minn. App. 1985) for discussion of owner’s consent in context of a damage to property charge.

See the Annotation at 57 A.L.R.3d 606, entitled “Validity and Construction of Statute Making it a Criminal Offense to ‘Tamper’ With Motor Vehicle or Contents, or to Obscure Registration Plates,” for a general discussion of the essential elements of tampering.

**CRIMJIG 16.25****THEFT—TELECOMMUNICATIONS SERVICES—  
DEFINED**

The statutes of Minnesota provide that whoever intentionally deprives another of a lawful charge for telecommunications service by:

[1] making, using, or attempting to make or use an unauthorized connection whether by physical, electrical, wire, microwave, radio, or other means to a component of a local telecommunication system,

[2] attaching an unauthorized device to a cable, wire, microwave, radio, or other component of a local telecommunication system,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(14).

**CRIMJIG 16.26****THEFT—TELECOMMUNICATIONS SERVICES—  
ELEMENTS**

The elements of theft of telecommunications services are:

[1] First, the defendant made, used, or attempted to make or use an unauthorized connection to a component of a local telecommunications system. Such a connection may be by physical, electrical, wire, microwave, radio, or other means.

[2] First, the defendant attached an unauthorized device to a cable, wire, microwave, radio, or other component of a local telecommunications system.

Second, the defendant acted with the intent to deprive the local telecommunications operator of a lawful charge for such services. In order to find the defendant intentionally deprived the operator of a lawful charge, you must find that the defendant made or was aware of the connection and was aware that the connection was unauthorized. The statutes of Minnesota provide that the existence of an unauthorized connection may be considered by you as evidence that the occupier of the premises at which the connection was made was aware of the connection and was aware that it was unauthorized. However, you should consider all the evidence on this issue, and the State bears the burden to prove beyond a reasonable doubt that the defendant was aware of the connection and was aware that it was not authorized.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the



property.

**CRIMJIG 16.27****THEFT—CABLE TELEVISION SERVICES—  
DEFINED**

Under Minnesota law, whoever intentionally deprives another of a lawful charge for cable television services by

[1] making, using, or attempting to make or use an unauthorized external connection outside the individual dwelling unit, whether by physical, electrical, wire, microwave, radio, or other means to a component of a licensed cable communications system,

[2] attaching any unauthorized device to a cable, wire, microwave, radio, or other component of a licensed cable communications system,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(12).

**CRIMJIG 16.28****THEFT—CABLE TELEVISION SERVICES—  
ELEMENTS**

The elements of theft of cable television services are:

[1] First, the defendant, by physical, electrical, wire, microwave, radio, or other means, made, used, or attempted to make or use, an unauthorized external connection outside the individual dwelling unit to a component of a licensed cable communications system.<sup>1</sup> ["Dwelling unit" means a single unit providing complete, independent, living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation.<sup>2</sup>]

[2] First, the defendant attached an unauthorized device to a cable, wire, microwave, radio, or other component of a licensed cable communications system.

Second, the defendant acted with the intent to deprive the licensed cable communications operator of a lawful charge for such services.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been so proven, the defendant is not guilty.

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**COMMENT**

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

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**16.28**

238 on Cable Communications.

<sup>1</sup>See Minnesota Statutes Chap.<sup>2</sup>See M.S.A. § 238.22, subd. 2.



**CRIMJIG 16.29****INTERFERING WITH CABLE COMMUNICATION  
SYSTEMS—COMMERCIAL ACTIVITY—DEFINED**

Under Minnesota law, whoever sells, rents, or offers or advertises for sale or rental any instrument, apparatus, equipment, or device designed to make an unauthorized connection to a licensed cable communication system, or a plan, a specification, or instructions for making an unauthorized connection, knowing that it is unauthorized, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.80, subd. 2.

**CRIMJIG 16.30****INTERFERING WITH CABLE COMMUNICATION  
SYSTEMS—COMMERCIAL ACTIVITY—ELEMENTS**

The elements of interfering with a cable communication system are:

First, the defendant (sold) (rented) (offered or advertised for sale or rent) [(\_\_\_\_\_) (any instrument, apparatus, equipment, or device) (plan, specifications, or instruction) for making or aiding an unauthorized connection to a licensed cable communication system].

Second, the (\_\_\_\_\_) (instrument, apparatus, equipment, device) (plan, specifications, or instructions) (was) (were) designed to make an unauthorized communication connection to a licensed cable communication system.

Third, the defendant knew that (instrument, apparatus, equipment device) (plan, specification, or instructions) would make or aid an unauthorized connection to a licensed cable communication system.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 16.31****THEFT OF CORPORATE PROPERTY—DEFINED**

Under Minnesota law, whoever, with intent to defraud, diverts corporate property other than in accordance with general business purposes or for purposes other than those specified in the corporation's articles of incorporation, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(15).



**CRIMJIG 16.32****THEFT OF CORPORATE PROPERTY—ELEMENTS**

The elements of theft are:

First, the defendant diverted (\_\_\_\_\_) (corporate property) away from the corporation.

Second, the diversion of the (\_\_\_\_\_) (corporate property) was not in accordance with general business purposes or was for purposes other than those specified in the corporation's articles of incorporation.

Third, the defendant acted with an intent to defraud. An "intent to defraud" is an intent to deceive another to gain some material advantage.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See CRIMJIGs 16.76 to 16.83 for issues of value and the nature of the property.

**CRIMJIG 16.33****UNAUTHORIZED DISTRIBUTION OF CORPORATE  
PROPERTY—DEFINED**

Under Minnesota law, whoever, with intent to defraud, authorizes or causes a corporation to make a distribution [in violation of Minnesota law [Insert appropriate violation of M.S.A. § 302A.551 or any other state law in conformity with it.]] is guilty of a crime.

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**COMMENT**

M.S.A. § 609.52, subd. 2(16).

**CRIMJIG 16.34****UNAUTHORIZED DISTRIBUTION OF CORPORATE  
PROPERTY—ELEMENTS**

The elements of theft are:

First, the defendant authorized or caused (a corporation) (\_\_\_\_\_) to make a distribution.

Second, the distribution (made the corporation unable to pay its debts in the ordinary course of business after the distribution) (\_\_\_\_\_)'.<sup>1</sup>

Third, the defendant acted with an intent to defraud. An "intent to defraud" is an intent to deceive another to gain some material advantage.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

See CRIMJIGs 16.76 to 16.83 for issues of value and the nature of the property.

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**16.34**

<sup>1</sup>M.S.A. § 609.52, subd. 2(16), refers to a "violation of M.S.A. § 302A.551 or any other state law in

conformity with it." Therefore, the instruction may have to be modified to the specific statute involved in the charge.



**CRIMJIG 16.35****COMMERCIAL BRIBERY—DEFINED**

Under Minnesota law, whoever, when not consistent with usually accepted business practices,

[1] corruptly offers, gives, or agrees to give, directly or indirectly, any benefit, consideration, compensation, or reward to any employee, agent, or fiduciary of a person with the intent to influence the person's performance or (his) (her) duties as an employee, agent, or fiduciary in relation to (his) (her) employer's or principal's business, or

[2] being an employee, agent, or fiduciary of a person, corruptly requests, receives, or agrees to receive, directly or indirectly, from another person any benefit, consideration, compensation, or reward with the understanding or agreement that (he) (she) shall be influenced in the performance of (his) (her) duties as an employee, agent, or fiduciary in relation to (his) (her) employer's or principal's business,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.86.

**CRIMJIG 16.36****COMMERCIAL BRIBERY—ELEMENTS**

The elements of commercial bribery are:

[1] First, the defendant (offered) (gave) (agreed to give), directly or indirectly, any benefit, consideration, compensation, or reward to any employee, agent, or fiduciary

Second, the defendant acted with the intent to influence the person's performance of the duties as an employee, agent, or fiduciary in relation to (his) (her) employer's or principal's business.

Third, the defendant acted corruptly. "Corruptly" means the defendant intended that the action injure or defraud the employer or principal of the person to whom (he) (she) offered, gave, or agreed to give the bribe or from whom (he) (she) requested, received, or agreed to receive the bribe.

[2] First, the defendant was an employee, agent, or fiduciary in relation to (his) (her) employer's or principal's business.

Second, the defendant corruptly (requested) (received) (agreed to receive), directly or indirectly, from another person any benefit, consideration, compensation, or reward.

Third, defendant acted with the understanding or agreement that defendant would be influenced in the performance of (his) (her) duties as an employee, agent, or fiduciary in relation to (his) (her) employer's or principal's business.

[Third] [Fourth], the defendant acted corruptly. "Corruptly" means the defendant intended that the action injure or defraud (his) (her) employer or principal.

In order to find that the defendant intended to injure or defraud, you must find (he) (she) acted with the purpose to do the thing or believe that the act would have that result. Intent, being a process of the mind, is not always susceptible to proof

by direct evidence, but may be inferred from all the circumstances surrounding the event.

Fourth, the defendant's act(s) took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any elements has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: Was the value of the benefit, consideration, compensation, or reward greater than \$500.00? You should answer this question "yes" or "no." If you have a reasonable doubt as to the answer, you should answer the question "no."

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**COMMENT**

M.S.A. § 609.86, subd. 3, provides for aggregation of values within any six month period for the purpose of sentencing. Should the defendant be charged accordingly, it is suggested that CRIMJIG 16.83 on aggregation of values should be appropriately modified for use.



**CRIMJIG 16.37**

**RUSTLING AND LIVESTOCK THEFT—DEFINED**

Under Minnesota law, whoever intentionally and without claim of right (shoots) (kills) (takes) (uses) (transfers) (conceals) (retains possession of) live cattle, swine, or sheep, or the carcasses thereof, that belong to another person without (the owner's) consent and with the intent to permanently deprive the owner, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.551, subd. 1.

## CRIMJIG 16.38

### RUSTLING AND LIVESTOCK THEFT—ELEMENTS

The elements of the theft are:

First, the defendant intentionally (shot) (killed) (took) (used) (transferred) (concealed) (retained possession of) \_\_\_\_\_.

Second, the defendant had no claim of right to the \_\_\_\_\_.

Third, the defendant's act was done without the consent of the owner of the \_\_\_\_\_.

Fourth, the defendant intended to deprive the owner permanently of the \_\_\_\_\_.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty, you have an additional issue to determine, and it will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Was the value of the \_\_\_\_\_ more than \$2500? Was the value of the \_\_\_\_\_ more than \$300 but not more than \$2500? Was the value of the \_\_\_\_\_ not more than \$300? If you have a reasonable doubt as to the value of the \_\_\_\_\_, you should answer "yes" to the lesser of the values you believe it had.<sup>1</sup>

The value of the \_\_\_\_\_ is the retail market value at the time of the defendant's act (or, if you cannot ascertain the retail market value, the cost of replacing the \_\_\_\_\_ within a rea-

#### 16.38

<sup>1</sup>When more than one act is in issue, CRIMJIG 16.83 should be

charged, and aggregation of value is read in lieu of this paragraph.

sonable time).

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COMMENT

M.S.A. § 609.551, subd. 1.

The definition of “value” set forth in M.S.A. § 609.52, subd. 1(3) does not specifically apply to this crime, but the Committee believes it reflects the law.



**CRIMJIG 16.39****RUSTLING AND LIVESTOCK THEFT—  
PURCHASERS, SELLERS, ETC.—DEFINED**

The statutes of Minnesota provide that whoever intentionally and without claim of right (shoots) (kills) (takes) (uses) (transfers) (conceals) (retains possession of) live cattle, swine, or sheep, or the carcasses thereof, that belong to another person without the owner's consent and with the intent to permanently deprive the owner, is guilty of a crime.

The statutes further provide that whoever knowingly (buys) (sells) (transports) or otherwise handles cattle, swine, or sheep acquired in such a crime, or who knowingly aids another in such a crime, is also guilty of a crime.

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**COMMENT**

M.S.A. § 609.551, subd. 2.

**CRIMJIG 16.40****RUSTLING AND LIVESTOCK THEFT—  
PURCHASERS, SELLERS, ETC.—ELEMENTS**

The elements of the crime are:

First, the \_\_\_\_\_ involved (was) (were) intentionally (shot) (killed) (taken) (used) (transferred) (concealed) (retained).

Second, the act was done without any claim of right.

Third, the act of (shooting) (killing) (taking) (using) (transferring) (concealing) (retaining) was committed without the consent of the owner.

Fourth, the act was done with the intent to deprive the owner permanently of the \_\_\_\_\_.

[1] Fifth, the defendant, knowing of the occurrence of the first four elements these events, (bought) (sold) (transported) or otherwise dealt with the \_\_\_\_\_.

[2] Fifth, the defendant, knowing that the act covered in the first four elements was being committed, aided in the commission of that act.

Sixth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Was the value of the \_\_\_\_\_ more than \$2500? Was the value of the \_\_\_\_\_ more than \$300 but not more than \$2500? Was the value of the \_\_\_\_\_ not more than \$300? If you have a reasonable doubt as to the value of the \_\_\_\_\_, you should

answer "yes" to the lesser of the values of the \_\_\_\_\_ you believe it had.<sup>1</sup>

The value of the \_\_\_\_\_ is the retail market value at the time of the defendant's act (or, if you cannot ascertain the retail market value, the cost of replacing the \_\_\_\_\_ within a reasonable time).

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COMMENT

M.S.A. § 609.551, subds. 1, 2.

*See also* the Comment to CRIMJIG 16.38.

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**16.40**

<sup>1</sup>When more than one act is charged, and aggregation of value is

in issue, CRIMJIG 16.83 should be used in lieu of this paragraph.



**CRIMJIG 16.41**

**UNAUTHORIZED RELEASE OF ANIMALS—  
DEFINED**

Under Minnesota law, whoever intentionally and without permission releases an animal lawfully confined for (science) (research) (commerce) (education), is guilty of a crime.

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COMMENT

M.S.A. § 609.552.

**CRIMJIG 16.42****UNAUTHORIZED RELEASE OF ANIMALS—  
ELEMENTS**

The elements of unauthorized release of an animal are:

First, the defendant intentionally released (\_\_\_\_\_) (an) (animal(s)).

Second, the (\_\_\_\_\_) (animal(s)) (was) (were) lawfully confined for the purpose of (science) (research) (commerce) (education).

Third, the defendant released (\_\_\_\_\_) (the animal(s)) without the permission of (\_\_\_\_\_) (the owner).

[Fourth, the defendant has previously, one or more occasions, committed this same offense.]

[Fourth] [Fifth], the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

While M.S.A. § 609.552 provides that a second or subsequent offense is a gross misdemeanor, rather than a misdemeanor, the last paragraph should not be used if the defendant stipulates to the existence of the prior offense. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984).

**CRIMJIG 16.43****POSSESSION OF SHOPLIFTING GEAR—DEFINED**

Under Minnesota law, whoever has in possession any device, gear, or instrument specially designed to [assist in shoplifting] [defeat an electronic surveillance system] with intent to use it to shoplift and thereby commit theft, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.521.

In *State v. Skinner*, 403 N.W.2d 912 (Minn.App.1987), the Court of Appeals rejected the defendant's arguments that the statute defining the offense of possession of shoplifting gear was unconstitutionally vague or overbroad. The Court upheld the statute because it requires proof of intent to use the gear in an illegal act.



**CRIMJIG 16.44****POSSESSION OF SHOPLIFTING GEAR—ELEMENTS**

The elements of the possession of shoplifting gear are:

First, the defendant possessed (\_\_\_\_\_).

Second, the \_\_\_\_\_ was specially designed [to assist in shoplifting] [defeat an electronic surveillance system].

Third, the defendant intended to use (\_\_\_\_\_) to shoplift.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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COMMENT

M.S.A. § 609.521.

## **CRIMJIG 16.45**

### **POSSESSION OF CODE-GRABBING DEVICE— DEFINED**

Under Minnesota law, whoever possesses a code-grabbing device with intent to use the device to commit an unlawful act, is guilty of a crime.

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#### **COMMENT**

M.S.A. § 609.586.

**CRIMJIG 16.46****POSSESSION OF CODE-GRABBING DEVICE—  
ELEMENTS**

The elements of possession of a code-grabbing device are:

First, the defendant possessed a code-grabbing device. A "code grabbing device" is a device that can receive and record a coded signal sent by a transmitter of a security or other electronic system, and that can play back the signal to disarm or operate that system.

Second, the defendant possessed the device with intent to use it to commit an unlawful act.

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.586.



**CRIMJIG 16.47****RECEIVING STOLEN PROPERTY—DEFINED**

Under Minnesota law, whoever receives, possesses, transfers, buys, or conceals property, knowing or having reason to know the property was (stolen) (or) (obtained by robbery), is guilty of a crime.

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**COMMENT**

M.S.A. § 609.53(1).

In *State v. Zgodava*, 384 N.W.2d 522 (Minn. App. 1986) and *State v. Peterson*, 375 N.W.2d 93 (Minn. App. 1985), the Court of Appeals rejected the argument that the “had reason to know” provision of the statute and corresponding jury instruction unconstitutionally diluted the State’s burden of proof.

**CRIMJIG 16.48****RECEIVING STOLEN PROPERTY—ELEMENTS**

The elements of receiving stolen property are:

First, the (\_\_\_\_\_) (property in question) was (stolen)<sup>1</sup> (or) (obtained by robbery). [This means that the (\_\_\_\_\_) (property) was taken by someone without the consent of the owner, and with the intention of depriving the owner permanently of possession of the property.]

Second, the defendant received, possessed, transferred, bought, or concealed the (\_\_\_\_\_) (property).

Third, the defendant knew or had reason to know the (\_\_\_\_\_) (property) was (stolen) (or) (obtained by robbery).

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.53, subd. 1

See CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

Possession of recently stolen property, if not satisfactorily explained, has been held to give rise to an inference that the person in possession knew the property was stolen. See *State v. Simonson*, 298 Minn. 235, 214 N.W.2d 679 (1974) (inference also from fact purchase price far below actual value); *State v. Carter*, 293 Minn. 102, 196 N.W.2d 607 (1972); *State v. Boykin*, 285 Minn. 276, 172 N.W.2d 754 (1969); *Barnes*

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**16.48**

<sup>1</sup>If there is an issue as to whether the property was stolen, give the appropriate language from M.S.A.

§ 609.52, or use the "Defined" and "Elements" of the appropriate CRIM-JIG in this Chapter.

*v. United States*, 412 U.S. 837, 93 S. Ct. 2357, 37 L.Ed.2d 380 (1973). But see *State v. Melina*, 297 Minn. 342, 210 N.W.2d 855 (1973), where it was held that it is not enough that the defendant "should have known" the property was stolen. Ordinarily, instructions as to permissible inferences should not be given to the jury.

Concealment under this statute does not necessarily involve hiding or secreting, but includes any act that renders its discovery by the true owner more difficult. *State v. Carter, supra*.



## CRIMJIG 16.49

RECEIVING STOLEN PROPERTY—PRECIOUS  
METAL DEALER—DEFINED

The statutes of Minnesota provide that whoever is a (precious metal dealer)<sup>1</sup> (scrap metal dealer)<sup>2</sup> or employee of a (precious metal dealer) (scrap metal dealer) and receives, possesses, transfers, buys, or conceals property, knowing or having reason to know the property was (stolen) (or) (obtained by robbery), is guilty of a crime.

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COMMENT

M.S.A. § 609.526.

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**16.49**

<sup>1</sup>Under M.S.A. § 325F.731 “precious metal dealer” means any natural person, partnership or corporation, either as principal or agent, engaging in the business of buying secondhand items containing precious metal, including, but not limited to, jewelry, watches, eating utensils, candlesticks, and religious and decorative objects. “Precious metals” means silver, gold and platinum. An “item containing precious metal” means an item made in whole or in part of metal and containing more than one percent by weight of silver, gold or platinum.

<sup>2</sup>Under M.S.A. § 325E.21 “scrap metal dealer” means every person, firm or corporation, including an agent, employer or representative thereof, engaging in the business of buying and selling wire and cable commonly and customarily used by communication and electric utilities. Note that the provisions **do not** apply to or include any person, firm or corporation engaged exclusively in the business of buying or selling motor vehicles, new or used paper or wood products, rags or furniture, second-hand machinery.

**CRIMJIG 16.50****RECEIVING STOLEN PROPERTY—PRECIOUS  
METAL DEALERS—ELEMENTS**

The elements of receiving stolen property are:

First, the (\_\_\_\_\_) (property in question) was (stolen) (or) (obtained by robbery). [This means that the (\_\_\_\_\_) (property) was taken by someone without the consent of the owner and with the intention of depriving the owner permanently of possession of the property.]

Second, the defendant received, possessed, transferred, bought, or concealed the (\_\_\_\_\_) (property).

Third, the defendant knew or had reason to know the (\_\_\_\_\_) (property) was (stolen) (or) (obtained by robbery).

Fourth, the defendant was a (precious metal dealer) (scrap metal dealer) (or) (an employee of a (precious metal dealer) (scrap metal dealer)).

[“Precious metal” means silver, gold, or platinum.] [A “precious metal dealer” or an “employee of a precious metal dealer” is any natural person, partnership, or corporation, either principal or agent, engaged in the business of buying second-hand items containing precious metals, including, but not limited to, jewelry, watches, eating utensils, candlesticks, and religious and decorative objects.]

[“Scrap metal” means (wire and cable commonly used by communication and electrical utilities) (copper, aluminum, or any other metal purchased primarily for its reuse or recycling value as raw metal, including metal that is combined with other materials at the time of purchase).] [A “scrap metal dealer” means every person, firm or corporation, including an agent, employer

or representative, engaged in the business or buying or selling scrap metal, or both.<sup>1</sup>]

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty of receiving stolen property, you will have additional issues to determine, and they will be put to you in the form of questions that will appear on the verdict form. You will answer the questions "yes" or "no":

[1] Was the value of the \_\_\_\_\_ (property) \$2,500.00 or more?

[1] Was the value of the \_\_\_\_\_ (property) less than \$2,500.00 but more than \$1,000?

[2] Was the value of the \_\_\_\_\_ (property) less than \$1,000.00 but more than \$500.00?

[3] Was the value of the \_\_\_\_\_ (property) \$500.00 or less?

The value of the \_\_\_\_\_ is the retail market value at the time of the defendant's taking possession of it (or, if you cannot ascertain the retail market value, the cost of replacing the property within a reasonable time).

If you have a reasonable doubt as to the value of the \_\_\_\_\_, you should answer "yes" to the lesser of the values you believe it had.

\_\_\_\_\_

**16.50**

<sup>1</sup>Note that the provisions **do not** apply to or include any person, firm or corporation engaged exclusively in the

business of buying or selling new or used motor vehicles or motor vehicle parts, paper or wood products, rags or furniture, or secondhand machinery.



## COMMENT

M.S.A. § 609.53, subd. 1a.

*See* CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

In an appropriate case, it may be necessary to more fully define the terms of the fourth element.

The definition of a “precious metal dealer” or “an employee of a precious metal dealer” in the fourth element is taken from M.S.A. § 325F.721, subd. 2. The definition of “scrap metal” and “scrap metal dealer” in the fourth element is taken from M.S.A. § 325E.21, subd. 1(d); subd. 1(e); and subd. 6.

Although the statutes make no distinctions in severity of the offense if the property involved is worth at least \$1,000.00, the Minnesota Sentencing Guidelines provide that it is a more severe offense if the property is worth at least \$2,500.00.

**CRIMJIG 16.51**

**FINANCIAL TRANSACTION CARD FRAUD—  
OBTAINING PROPERTY OF ANOTHER—DEFINED**

Under Minnesota law, whoever, without the consent of the cardholder, and knowing the cardholder has not given consent, uses or attempts to use a financial transaction card or the account number of a financial transaction card to obtain the property of another or public assistance benefit, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.821, subd. 2(1).

**CRIMJIG 16.52****FINANCIAL TRANSACTION CARD FRAUD—  
OBTAINING PROPERTY OF ANOTHER—  
ELEMENTS**

The elements of financial transaction card fraud are:

First, the \_\_\_\_\_ (property) alleged to have been obtained was the property of (\_\_\_\_\_) (a person other than the defendant).

Second, the defendant intentionally (used) (attempted to use) a financial transaction card or the account number of a financial transaction card to obtain the \_\_\_\_\_ (property) [a public assistance benefit]. [A "financial transaction card" is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining credit, money, goods, services, public assistance benefits, or anything else of value.]

Third, (\_\_\_\_\_) (the person in whose name the card was issued) did not consent to the defendant's use of the card.

Fourth, the defendant knew that (\_\_\_\_\_) (the person in whose name the card was issued) did not consent to the defendant's use of the card.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



**COMMENT**

*See* CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property.

**CRIMJIG 16.53**

**FINANCIAL TRANSACTION CARD FRAUD—  
FORGED CARD—DEFINED**

Under Minnesota law, whoever uses or attempts to use a financial transaction card or the account number of a financial transaction card, knowing it to be forged, false, fictitious, or obtained under false pretenses, is guilty of a crime.

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COMMENT

M.S.A. § 609.821, subd. 2(2).

**CRIMJIG 16.54****FINANCIAL TRANSACTION CARD FRAUD—  
FORGED CARD—ELEMENTS**

The elements of financial transaction card fraud are:

First, the defendant (used) (attempted to use) a financial transaction card or the account number of a financial transaction card. [A "financial transaction card" is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining credit, money, goods, services, or anything else of value.]

[1] Second, at the time the defendant (used) (attempted to use) the card, the defendant knew it was forged, false, or fictitious.

[2] Second, at the time the defendant (used) (attempted to use) the card, the defendant knew it had been obtained from an issuer (by the defendant knowingly giving a false name or occupation) (by the defendant knowingly and substantially overvaluing assets or substantially undervaluing indebtedness) (by the defendant knowingly making a false statement or representation) (for the purpose of inducing the issuer to issue a card) (for the purpose of inducing an issuer to issue a financial transaction card used to obtain a public assistance benefit),. [An "issuer" is a person, firm, or duly authorized agent that issues a financial transaction card.]

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



## COMMENT

*See* CRIMJIGs 16.76 to 16.83 for issues of value and the nature of the property.

Although the essence of this offense is similar to uttering a forged instrument, the statute provides that the penalty is to be determined in the manner provided in M.S.A. § 609.52, subd. 3.

**CRIMJIG 16.55****FINANCIAL TRANSACTION CARD FRAUD—SALE  
OF CARD—DEFINED**

Under Minnesota law, whoever sells or transfers a financial transaction card or the account number of a financial transaction card, knowing that the cardholder and issuer have not authorized the person to whom the card is sold or transferred to use the card, or knowing that the card is forged, false, fictitious, or obtained under false pretenses, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.821, subd. 2(3).

**CRIMJIG 16.56****FINANCIAL TRANSACTION CARD FRAUD—SALE  
OF CARD—ELEMENTS**

The elements of financial transaction card fraud are:

First, the defendant intentionally (sold) (transferred) a financial transaction card or the account number of a financial transaction card. [A “financial transaction card” is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by any issuer for the use of the cardholder in obtaining credit, money, goods, services, or anything else of value.]

[1] Second, at the time the defendant (sold) (transferred) the card, the defendant knew that the person in whose name the card was issued and the issuer had not authorized the person who received the card to use it.

[2] Second, at the time the defendant (sold) (transferred) the card, the defendant knew that it was forged, false, or fictitious.

[3] Second, at the time the defendant (sold) (transferred) the card, the defendant knew that it had been obtained because, at the time of the application, the defendant (knowingly gave a false name or occupation) (knowingly and substantially overvalued the assets or substantially undervalued the indebtedness) (knowingly made a false statement or representation) (for the purpose of inducing the issuer to issue a card) (for the purpose of inducing an issuer to issue a financial transaction card used to obtain a public assistance benefit), [An “issuer” is a person, firm, or duly authorized agent that issues a financial transaction card.]

Third, the defendant’s act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.



If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 16.57****FINANCIAL TRANSACTION CARD FRAUD—CARD  
POSSESSION—DEFINED**

Under Minnesota law, whoever, without a legitimate business purpose, and without the consent of the cardholder(s), receives or possesses, with intent to use, or with intent to sell or transfer in violation of Minnesota statutes, two or more financial transaction cards, or the account numbers of two or more financial transaction cards, issued in the name of another, or two or more cards knowing the cards to be forged, false, fictitious, or obtained under false pretenses, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.821, subd. 2(4).

**CRIMJIG 16.58****FINANCIAL TRANSACTION CARD FRAUD—CARD  
POSSESSION—ELEMENTS**

The elements of financial transaction card fraud are:

First, the defendant intentionally (received) (possessed) two or more financial transaction cards or the account numbers of financial transaction cards. [A “financial transaction card” is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining credit, money, goods, services, or anything else of value.]

[1] Second, the cards were issued in the name of a person other than the defendant.

[2] Second, the defendant knew that the cards were forged, false, or fictitious.

[3] Second, the defendant knew that the cards were obtained by a person, who, when applying for a financial transaction card (knowingly gave a false name or occupation) (knowingly and substantially overvalued assets or substantially undervalued<sup>1</sup> the indebtedness for the purpose of inducing the issuer to issue a card) (knowingly made a false statement or representation) (for the purpose of inducing the issuer to issue a card) (for the purpose of inducing an issuer to issue a financial transaction card used to obtain a public assistance benefit), [An “issuer” is a person, firm, or duly authorized agent that issues a financial transaction card.]

Third, at the time of the defendant’s (receipt) (possession) of the card, the defendant acted without a legitimate business purpose.

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16.58

<sup>1</sup>The statute does not include

“knowing” as an element of undervaluing indebtedness.



[1] Fourth, the defendant (received) (possessed) the cards with the intent to use them.

[2] Fourth, the defendant (received) (possessed) the cards with the intent to transfer them to a person that the defendant knew had not been authorized by the person in whose name the card was issued and the issuer to use the card.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 16.59****FINANCIAL TRANSACTION CARD FRAUD—  
PROVIDER FRAUD—DEFINED**

Under Minnesota law, whoever is authorized by an issuer to furnish money, goods, services, or anything else of value, and knowingly and with intent to defraud the issuer or the cardholder

[1] furnishes money, goods, services, or anything else of value upon presentation of a financial transaction card, knowing it to be forged, expired, or revoked, or knowing that it is presented by a person without authority to use the card,

[2] represents in writing to the issuer that the person has furnished money, goods, services, or anything else of value that has not in fact been furnished,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.821, subd. 2(5).

**CRIMJIG 16.60****FINANCIAL TRANSACTION CARD FRAUD—  
PROVIDER FRAUD—ELEMENTS**

The elements of financial transaction card fraud are:

First, the defendant was authorized by (\_\_\_\_\_) (an issuer) to furnish (money) (goods) (services) (anything of value) upon presentation of a financial transaction card or account number of a financial transaction card. [A "financial transaction card" is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining credit, money, goods, services, or anything else of value.] [An "issuer" is a person, firm, or duly authorized agent that issues a financial transaction card.]

[1] Second, the defendant furnished to (\_\_\_\_\_) (another), (money) (goods) (services) (anything of value) upon the presentation of a financial transaction card.

Third, at the time the defendant furnished the (money) (goods) (services) (anything of value), the defendant knew the card was (forged) (expired) (revoked) (presented by a person who did not have authority to use the card).

[2] Second, the defendant represented in writing to the issuer that the defendant had furnished to (\_\_\_\_\_) (the person presenting the card) (money) (goods) (services) (anything of value).

Third, the defendant had not in fact furnished to the person presenting the card the (money) (goods) (services) (anything of value).

Fourth, the defendant's act was done with the intent to defraud the issuer.



Fifth, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

\_\_\_\_\_

**COMMENT**

See CRIMJIG 16.76 to 16.83 for issues of value and the nature of the property.

**CRIMJIG 16.61****FINANCIAL TRANSACTION CARD FRAUD—FALSE APPLICATION—DEFINED**

Under Minnesota law, whoever (upon applying for a financial transaction card) (upon applying for a public assistance benefit distributed by means of a financial transaction card),

[1] knowingly gives a false name and occupation,

[2] knowingly and substantially overvalues assets or substantially undervalues indebtedness for purposes of inducing the issuer to issue a financial transaction card,

[3] knowingly makes a false statement or representation for the purpose of inducing an issuer to issue a financial transaction card used to obtain a public assistance benefit,

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.821, subd. 2(6).

**CRIMJIG 16.62****FINANCIAL TRANSACTION CARD FRAUD—FALSE APPLICATION—ELEMENTS**

The elements of financial transaction card fraud are:

First, the defendant applied to (\_\_\_\_\_) (an issuer) for a financial transaction card or an account number of a financial transaction card. [A "financial transaction card" is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining credit, money, goods, services, or anything else of value.] [An "issuer" is a person, firm, or authorized agent that issues a financial transaction card.]

[1] Second, at the time of applying for the card, the defendant knowingly gave a false name or occupation.

[2] Second, at the time of applying for the card, the defendant (knowingly and substantially overvalued (her) (his) assets) (substantially undervalued<sup>1</sup> (his) (her) indebtedness) for the purpose of inducing (\_\_\_\_\_) (the issuer) to issue a financial transaction card.

[3] Second, at the time of applying for the card, the defendant knowingly made a false statement or representation for the purpose of inducing an issuer to issue a financial transaction card used to obtain a public assistance benefit.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find

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16.62

<sup>1</sup>The statute does not include

"knowing" as an element of undervaluing indebtedness.



any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: Did the defendant obtain any property other than a financial transaction card? You will answer this question "yes" or "no." If you have a reasonable doubt as to the answer, you will answer "no."

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#### COMMENT

If the jury answers this special question "yes," the statute provides that the sentence that may be imposed for the violation is determined in the manner of M.S.A. § 609.52, subd. 3. Accordingly, the relevant instructions of CRIMJIG 16.76 to 16.83 should be given.

**CRIMJIG 16.63****FINANCIAL TRANSACTION CARD FRAUD—FALSE  
THEFT REPORT—DEFINED**

Under Minnesota law, whoever, with intent to defraud, falsely notifies the issuer or any other person of a theft, loss, disappearance, or non-receipt of a financial transaction is guilty of a crime.

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**COMMENT**

M.S.A. § 609.821, subd. 2(7).

**CRIMJIG 16.64****FINANCIAL TRANSACTION CARD FRAUD—FALSE  
THEFT REPORT—ELEMENTS**

The elements of financial transaction card fraud are:

First, the defendant notified (\_\_\_\_\_) (an issuer) (a person) of a (theft) (loss) (disappearance) (non-receipt) of a financial transaction card. [A "financial transaction card" is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining credit, money, goods, services, or anything else of value.] [An "issuer" is a person, firm, or duly authorized agent that issues a financial transaction card.]

Second, the notification was false.

Third, at the time the defendant gave the notice, the defendant intended to defraud.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: Did the defendant obtain any property other than a financial transaction card? You will answer this question "yes" or "no." If you have a reasonable doubt as to the answer, you will answer "no."



**COMMENT**

If the jury answers this special question “yes,” the statute provides that the sentence that may be imposed for the violation is determined in the manner of M.S.A. § 609.52, subd. 3. Accordingly, the relevant instructions of CRIMJIGs 16.76 to 16.83 should be given.

**CRIMJIG 16.65****FINANCIAL TRANSACTION CARD FRAUD—  
ALTERATION OF CARD—DEFINED**

Under Minnesota law, whoever, without the consent of the cardholder and knowing that the cardholder has not given consent, falsely alters, makes, or signs any written document pertaining to a card transaction to obtain or attempt to obtain the property of another, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.821, subd. 2(8).

**CRIMJIG 16.66****FINANCIAL TRANSACTION CARD FRAUD—  
ALTERATION OF CARDS—ELEMENTS**

The elements of financial transaction card fraud are:

First, the defendant falsely altered, made, or signed (\_\_\_\_\_) (any written document pertaining to a financial card transaction). [A “financial transaction card” is any instrument or device, whether known as a credit card, credit plate, charge plate, courtesy card, bank services card, banking card, check guarantee card, debit card, electronic benefit system (EBS) card, electronic benefit transfer (EBT) card, or assistance transaction card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining credit, money, goods, services, or anything else of value.]

Second, the defendant acted without the consent of the cardholder.

Third, the defendant knew that the cardholder had not given consent to the defendant's act.

Fourth, the defendant (obtained) (attempted to obtain) (\_\_\_\_\_), the property of another.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



**CRIMJIG 16.67****FINANCIAL TRANSACTION CARD FRAUD—VALUE**

[For use with CRIMJIGs 16.46, 16.47, 16.50, 16.51, 16.52, and 16.57]

If you find the defendant is guilty of one or more acts of financial transaction card fraud, you have an additional issue to determine, and it will be put to you in the form of questions on the verdict form. The questions are: Was the value of the property obtained or attempted to be obtained more than \$35,000, or was the aggregate amount of the transactions more than \$35,000? Was the value of the property obtained or attempted to be obtained more than \$2500 but not more than \$35,000, or was the aggregate amount of the transactions more than \$2500 but not more than \$35,000? Was the value of the property obtained or attempted to be obtained more than \$200, but not more than \$2500, or was the aggregate amount of the transactions more than \$200 but not more than \$2500? [If your answer to the previous question was “yes,” then answer the following question: Has the defendant been convicted within the preceding five years of the felony or gross misdemeanor offense of \_\_\_\_\_?]<sup>1</sup>] Was the value of the property obtained or attempted to be obtained not more than \$200, or was the aggregate amount of the transactions not more than \$200? If you have a reasonable doubt as to the value of the property, you should answer “yes” to the lesser of the values you believe it had.

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**COMMENT**

*See State v. Davidson*, 351 N.W.2d 8 (1984) to the effect that a stipulation to a prior offense removes the issue from consideration by the jury.

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**16.67**

<sup>1</sup>This question should be used only in cases in which the defendant has been charged with an enhanced violation as the result of a prior conviction

under M.S.A. §§ 609.631; 609.24; 609.245; 609.52; 609.53; 609.582, subd. 1, 2 or 3; 609.625; 609.63; 609.821, or a conforming statute from another State.

**CRIMJIG 16.68****WRONGFULLY OBTAINING PUBLIC ASSISTANCE—  
DEFINED**

Under Minnesota law, whoever, by

[1] means of a willfully false statement or representation,

[2] by intentional concealment of a material fact,

[3] impersonation or other fraudulent device,

[A] obtains or attempts to obtain,

[B] aids another in obtaining,

[C] continues to receive,

assistance to which the person is not entitled or assistance in an amount greater than that to which the person is entitled, is guilty of a crime.

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**COMMENT**

M.S.A. § 256.98, subd. 1.

No instruction is provided for those cases in which the defendant is charged with buying or helping to dispose of property that may be subject to claims by the State because of assistance extended to the owner thereof. The nature of such claims is so diverse that a standard instruction is almost impossible to prepare.

**CRIMJIG 16.69****WRONGFULLY OBTAINING PUBLIC ASSISTANCE—  
ELEMENTS**

The elements of wrongfully obtaining public assistance are:

[1] First, the defendant (obtained) (or) (attempted to obtain) (or) (continued to receive) public assistance. \_\_\_\_\_ is such assistance.

[2] First, the defendant aided \_\_\_\_\_ in obtaining assistance. \_\_\_\_\_ is such assistance.

Second, (\_\_\_\_\_) (the defendant) was not entitled to any assistance at all, or received assistance in a greater amount than that to which the defendant was entitled, and the defendant knew this.

Third, (the defendant) (or) (\_\_\_\_\_, with the defendant's knowledge and encouragement)

[A] made the following statement or representation:  
\_\_\_\_\_.

[B] intentionally concealed a material fact, in that:  
\_\_\_\_\_.

[C] represented (himself) (herself) to be \_\_\_\_\_. It does not matter whether \_\_\_\_\_ is a real or fictitious person.

[D] \_\_\_\_\_.

Fourth, the defendant knew

[A] that the statement or representation was false.

[B] that the fact concealed was material.

[C] that the impersonation was false.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.



If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

[If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are): Was the value of the (excess) assistance (received) (sought) more than \$2500? Was the value of the (excess) assistance (received) (sought) more than \$250 but not more than \$2500? Was the value of the (excess) assistance (received) (sought) not more than \$250? You will answer one of these questions "yes." If you have a reasonable doubt as to the value of the assistance, you should answer "yes" to the lesser of the values you believe it had.]

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#### COMMENT

M.S.A. § 256.98, subd. 1.

In *State v. Ibarra*, 355 N.W.2d 125 (Minn. 1984), the Supreme Court indicated that the instruction accurately established the elements of the offense for wrongfully obtaining assistance.

**CRIMJIG 16.70****INSURANCE FRAUD—DEFINED**

The statutes of Minnesota provide that whoever with the intent to defraud for the purpose of depriving another of property or for pecuniary gain, commits, or permits its employees or its agents to

[1] present, cause to be presented, or prepared with knowledge or reason to believe that it will be presented, by or on behalf of an insured, claimant, or applicant to an insurer, insurance professional, or premium finance company in connection with an insurance transaction or premium finance transaction, any information that contains a false representation as to any material fact, or that conceals a material fact concerning (an application for, rating of, or renewal of, an insurance policy) (a claim for payment or benefit under an insurance policy) (a payment made according to the terms of an insurance policy) (an application used in a premium finance transaction),

[2] present, cause to be presented, or prepare with knowledge or reason to believe that it will be presented, to or by an insurer, insurance professional, or a premium finance company in connection with an insurance transaction or premium finance transaction, any information that contains a false representation as to any material fact, or that conceals a material fact, concerning (a solicitation for sale of an insurance policy or purported insurance policy) (an application for certificate of authority) (the financial condition of an insurer) (the acquisition, formation, merger, affiliation, or dissolution of an insurer),

[3] solicit or accept new or renewal insurance risks by or for an insolvent insurer,

[4] remove the assets or any record of assets, transactions, and affairs or any material part thereof, from the home office or other place of business of an insurer, or from the place of safekeeping of an insurer, or destroy or sequester the same from the department of commerce,

[5] divert, misappropriate, convert, or embezzle funds of an insurer, insured, claimant, or applicant for insurance in connection with (an insurance transaction) (the conducting of business activities by an insurer or insurance professional) (the acquisition, formation, merger, affiliation, or dissolution of any insurer),

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.611, subd. 1.



**CRIMJIG 16.71****INSURANCE FRAUD—ELEMENTS**

The elements of defrauding an insurer are:

[1] First, the defendant presented, caused to be presented, or prepared with knowledge or reason to believe that it would be presented, by or on behalf of an insured, claimant, or applicant to an insurer, insurance professional, or premium finance company in connection with an insurance transaction or premium finance transaction, any information that contained a false representation as to any material fact, or that concealed a material fact concerning (an application for, rating of, or renewal of, an insurance policy) (a claim for payment or benefit under an insurance policy) (a payment made according to the terms of an insurance policy) (an application used in a premium finance transaction).

[2] First, the defendant presented, caused to be presented, or prepared with knowledge or reason to believe that it would be presented, to or by an insurer, insurance professional, or a premium finance company in connection with an insurance transaction or premium finance transaction, any information that contains a false representation as to any material fact, or that conceals a material fact, concerning (a solicitation for sale of an insurance policy or purported insurance policy) (an application for certificate of authority) (the financial condition of an insurer) (the acquisition, formation, merger, affiliation, or dissolution of an insurer).

[3] First, the defendant solicited or accepted new or renewal insurance risks by or for an insolvent insurer.

[4] First, the defendant removed the assets or any record of assets, transactions, and affairs or any material part thereof, from the home office or other place of business of an insurer, or from the place of safekeeping of an insurer, or destroyed or sequestered the same from the department of commerce.

[5] First, the defendant diverted, misappropriated, converted, or embezzled funds of an insurer, insured, claimant, or

applicant for insurance in connection with (an insurance transaction) (the conducting of business activities by an insurer or insurance professional) (the acquisition, formation, merger, affiliation, or dissolution of any insurer).

Second, the defendant intended to defraud for the purpose of depriving another of property or for pecuniary gain.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

\_\_\_\_\_

**COMMENT**

M.S.A. § 609.611, subd. 1.

See M.S.A. § 609.611, subd. 4, for a definition of terms used in the statute.

The maximum sentence that may be imposed is dependent upon the nature and the amount of loss as provided in M.S.A. § 609.52, subd. 3. See CRIMJIGs 16.76 to 16.83 for the appropriate instruction.

**CRIMJIG 16.72****FALSE REPRESENTATION OF AN INSURANCE  
CLAIM—DEFINED**

Under Minnesota law, whoever, in order to claim a payment or benefit, intentionally makes a false representation to an insurance company that personal property was lost, stolen, damaged, destroyed, misplaced, or disappeared, knowing the claim to be false, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.611, subd. 1(a)(2).

While this offense is covered by CRIMJIGs 16.70 and 16.71, it is the opinion of the Committee that this is the offense most often charged, and this jury instruction, while it does not reflect the exact language of the statute, is an accurate plain-language statement of the law.



**CRIMJIG 16.73**

**FALSE REPRESENTATION OF AN INSURANCE  
CLAIM—ELEMENTS**

The elements of false representation of an insurance claim are:

First, the defendant intentionally made a representation to (\_\_\_\_\_) (an insurance company) that (\_\_\_\_\_) (personal property) was lost, stolen, damaged, destroyed, misplaced, or disappeared.

Second, the defendant acted intentionally in making the representation.

Third, the defendant knew the claim was false.

Fourth, the defendant made the representation to claim a payment or benefit under an insurance policy.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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**COMMENT**

M.S.A. § 609.611, subd. 1(a)(2).

The maximum sentence that may be imposed is dependent upon the nature and the amount of loss as provided in M.S.A. § 609.52, subd. 3. See CRIMJIGs 16.76 through 16.83 for the appropriate instruction.

## **CRIMJIG 16.74**

### **FRAUD OF HOTEL OR RESTAURANT OWNER (DEFRAUDING AN INNKEEPER)—DEFINED**

Under Minnesota law, whoever, with intent to defraud the owner or manager,

[1] obtains food, lodging, or other accommodations at any (hotel) (restaurant) without paying for it,

[2] obtains credit for food, lodging, or other accommodations at any (hotel) (restaurant),

is guilty of a crime.

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#### **COMMENT**

M.S.A. § 327.75, subd. 1.

**CRIMJIG 16.75****FRAUD OF HOTEL OR RESTAURANT OWNER  
(DEFRAUDING AN INNKEEPER)—ELEMENTS**

The elements of fraud of a (hotel) (restaurant) owner are:

[1] First, the defendant obtained (food) (lodging) (other accommodations) at a (hotel) (restaurant).

[2] First, the defendant obtained credit for (food) (lodging) (other accommodations) at a (hotel) (restaurant).

Second, the defendant acted with intent to defraud the owner or manager.

[In determining whether the requirement of intent has been proven beyond a reasonable doubt, you should consider all the evidence of intent. The law allows, but does not require, you to find such an intent from proof beyond a reasonable doubt of the following:

[a] the defendant obtained the services or credit for the services by false pretense, or by false or fictitious show or pretense of baggage or other property;

[b] the defendant refused or neglected to pay for the services upon demand;

[c] the defendant gave, in payment of the services, negotiable paper on which payment was refused;

[d] the defendant absconded without offering to pay for the services;

[e] the defendant surreptitiously removed or attempted to remove (his) (her) baggage.

You should consider any other relevant evidence on this matter].

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.



If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

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#### COMMENT

M.S.A. § 327.75, subd. 2, sets forth the conduct that constitutes prima facie proof of fraud. Although the Committee recognizes there may be a dispute as to how the jury should be instructed regarding this provision, the bracketed language contained in the second element is recommended whenever the factual situation warrants it.

Intent to defraud must be established beyond a reasonable doubt. *State v. Higgin*, 257 Minn. 46, 99 N.W.2d 902 (1959).

The language in M.S.A. § 327.75, subd. 2, is similar to the presumption standard contained in M.S.A. § 609.535. In *State v. Williams*, 324 N.W.2d 154 (Minn. 1982), the Supreme Court, interpreting M.S.A. § 609.535, found that due process requires that the trier of fact be able to credit or reject inferences. Thus, an instruction requiring the jury to find the presumed fact of intent was tantamount to an irrebuttable presumption that denied due process.

The Committee construes *Williams* as requiring that the jury be instructed as to the facts from which intent may, but not necessarily must, be inferred. See also *State v. Ferraro*, 290 N.W.2d 177 (Minn. 1980).

In those exceptional cases where the definition of “hotel” is at issue, the court should read M.S.A. § 327.70, subd. 3. Although the fraud statute contains no definition of “restaurant,” the trial judge should refer to M.S.A. §§ 157.01 and 340.07, subds. 12 and 14 for guidance in drafting an instruction on the definition of “hotel,” “restaurant,” or “restaurant owner.”

**CRIMJIG 16.76**

**PROPERTY DEFINED**

**The \_\_\_\_\_ involved in this case is property.**

\_\_\_\_\_

**COMMENT**

M.S.A. § 609.52, subd. 1(1).

This instruction should be used only when the property involved is of an unusual nature, such as electricity or electronic signals, and the jury might be in doubt. Whether the matter in question is property is a question of law, and the jury should be instructed that it is property.

**CRIMJIG 16.77**

**MOVABLE PROPERTY DEFINED**

Movable property is property whose physical location can be changed. \_\_\_\_\_ is movable property, even though it was (growing on) (affixed to) (found on) land, since its physical location could be changed.

\_\_\_\_\_

**COMMENT**

M.S.A. § 609.52, subd. 1(2).

This instruction should be used only when the property involved is of such a nature as to make its movability doubtful.



**CRIMJIG 16.78****PROPERTY OF ANOTHER—PART INTEREST IN  
DEFENDANT**

The \_\_\_\_\_ may be the property of a person other than the defendant, even though the defendant was (a co-owner of the \_\_\_\_\_) (in possession of the \_\_\_\_\_ as (an employee) (an agent) (a lessee) (a bailee)).

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**COMMENT**

M.S.A. § 609.52, subd. 1(8).

**CRIMJIG 16.79****NATURE OF PROPERTY INVOLVED**

If you find the defendant guilty of theft, you have an additional issue to determine, and it will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (are) (is):

[1] Was the property stolen a Schedule 1 or 2 controlled substance, other than marijuana? \_\_\_\_\_ is a Schedule 1 or 2 controlled substance.

[2] Was the property stolen an article representing a trade secret?<sup>1</sup>

[3] Was the property taken an explosive or incendiary device?<sup>2</sup>

[4] Was the property stolen a Schedule 3, 4, or 5 controlled substance? \_\_\_\_\_ is such a controlled substance.

[5] Was the property taken from the person of another or from a corpse or grave or coffin containing a corpse?

[6] Was the property a record of a court or officer, or a writing, instrument, or record kept, filed, or deposited according to law, or with or in the keeping of a public officer or office?

[7] Was the property [taken from a burning, abandoned, or vacant building] (or) [taken after its removal from a burning, abandoned, or vacant building] [taken from an area of destruction caused by civil disaster, riot, bombing, or the proximity of a battle]?

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**16.79**

<sup>1</sup>See M.S.A. § 609.52, subd. 1(6), for definition of trade secret.

<sup>2</sup>See M.S.A. § 299F.72 for definition of explosive and incendiary device.

[8] Did the property consist of public funds belonging to the State or a political subdivision of or agency of the State? \_\_\_\_\_ is a (political subdivision) (agency) of the State.

[9] Was the property a firearm?<sup>3</sup>

[10] Was the property a motor vehicle?<sup>4</sup>

You will answer the question(s) "yes" or "no." If you have a reasonable doubt as to the answer, you should answer "no."

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COMMENT

M.S.A. § 609.52, subd. 3.

In its decision in *In the Matter of the Welfare of D.D.S.*, 396 N.W.2d 831 (Minn. 1986), the Supreme Court held that theft from a person was committed when the property was in the immediate presence or control of the victim, even if it was not actually "attached" to the victim.

In *State v. Saybolt*, 461 N.W.2d 729 (Minn. App. 1990), the defendant was convicted of attempted theft by swindle of over thirty-five thousand (\$35,000) dollars of contract profits from his former employer. The Court of Appeals held that it was error, though not reversible error under the facts of that case, to fail to instruct the jury on the definition of what constitutes property for purposes of a prosecution under M.S.A. § 609.52.

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<sup>3</sup>See M.S.A. § 609.02, subd. 2. Note also that the term "firearm" applies to a "firearm" manufactured as such, even if there is some mechanical defect that rendered it temporarily

inoperable. *LaMere v. State*, 278 N.W.2d 552 (Minn. 1979). See also M.S.A. § 609.713 for replica firearms.

<sup>4</sup>See M.S.A. 169.01, subds. 2, 3.



**CRIMJIG 16.80****INTENT TO EXERCISE TEMPORARY CONTROL**

If you find that the defendant did not specifically intend to deprive the owner permanently of possession, but took the \_\_\_\_\_ with intent to exercise temporary control only, this element of the crime is satisfied

[1] if the defendant showed by (his) (her) control that (he) (she) was indifferent to the rights of the owner or the restoration of the \_\_\_\_\_ to the owner.

[2] if the defendant pledged the \_\_\_\_\_ to someone else as security for a loan or if in some other way subjected it to claim by someone else.<sup>1</sup>

[3] if the defendant intended to return the \_\_\_\_\_ to its owner only if the owner paid a reward or otherwise paid for its return.

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**COMMENT**

M.S.A. § 609.52, subd. 2(5).

This instruction is intended to be read as part of the “Elements” instruction concerning intent to deprive the owner permanently of possession.

See *State v. Simonson*, 298 Minn. 235, 214 N.W.2d 679 (1974), with respect to withholding possession for a reward.

In *State v. O'Hagan*, 474 N.W.2d 613 (Minn. App. 1991), the Court of Appeals held that in a prosecution for violation of M.S.A. § 609.52, subd. 2(5), the trial court committed no error in refusing to define “indifference to the rights of the owner” as requiring proof of “willful, reckless or malicious disregard” of the owner’s rights. The Court held that the word “indifference” was a word of common understanding and was defined as a lack of concern, interest, or feeling; under the plain meaning of the phrase, the prosecution was not required to prove an element of willful, reckless, or malicious disregard of the rights of the owner.

**16.80**

<sup>1</sup>Because the law of pledges and security is likely to be a mystery to the jury, language tailored to the particu-

lar facts of the case should be used at this point. (E.g., “If the defendant pawned the \_\_\_\_\_ with a pawnbroker . . .”)

In *State v. Greiner*, 518 N.W.2d 636 (Minn. App. 1994), the Court of Appeals held that theft with intent to exercise temporary control is an offense that continues, for purposes of the statute of limitations, for so long as the defendant possesses the property and intends to exercise control over it. The Court held that once the defendant had spent the stolen money, the statute of limitations began to run.

**CRIMJIG 16.81****INTENT TO EXERCISE TEMPORARY CONTROL—  
VALUE**

If you find that the \_\_\_\_\_ was returned to its owner, and that the defendant did not intend to deprive the owner permanently of its possession, although the circumstances nonetheless make the defendant guilty of theft, the value of the property taken is the value of the use of the property that the defendant had, or the amount of any damage the property may have suffered, whichever is greater.

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**COMMENT**

M.S.A. § 609.52, subd. 1(3).

This instruction is intended to be read only when a violation of M.S.A. § 609.52, subd. 2(5)(a) or 2(5)(b) is involved.



**CRIMJIG 16.82****VALUE**

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (is) (are): Was the value of the \_\_\_\_\_ more than \$35,000? Was the value of the \_\_\_\_\_ more than \$5000, but not more than \$35,000? Was the value of the \_\_\_\_\_ more than \$1000, but not more than \$5000? Was the value of the \_\_\_\_\_ more than \$500, but not more than \$1000? Was the value of the \_\_\_\_\_ not more than \$500? You will answer one of the questions "yes." If you have a reasonable doubt as to the value of the \_\_\_\_\_, you should answer "yes" to the lesser of the values you believe it had.

The value of the \_\_\_\_\_ is the retail market value at the time of the taking or, if you cannot ascertain the retail market value, the cost of replacing the property within a reasonable time. [For a check, draft, or other order for the payment of money, "value" means the amount of money promised or ordered to be paid under the terms of the check, draft, or other order.]

Was the property stolen a firearm<sup>1</sup>? Was the property stolen (an article representing a trade secret) (an explosive or incendiary device) (a controlled substance listed in schedule I or II, with the exception or marijuana)? Was the property stolen a controlled substance listed in schedule III, IV, or V? Has the defendant been convicted within the preceding five years for an offense under \_\_\_\_\_<sup>2</sup> or a statute from another state, the United States, or a foreign jurisdiction (in conformity) (similar to) that

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**16.82**

<sup>1</sup>M.S.A. § 97A.015 Subd. 19 defines a "firearm" as a "gun that discharges shot or a projectile by means of an explosive, a gas, or compressed air." The statute limits application of the definition to Chaps. 97A, 97B and 97C. M.S.A. § 609.666, subd. 1(a) (Neg-

ligent storage of firearms) defines a "firearm" as "a device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion or force of combustion." The statute limits the definition to the statute.

<sup>2</sup>See M.S.A. § 609.52, subd. 3(c) for list of offenses

section? If so, did the defendant receive a sentence or a stay of sentence for a felony or gross misdemeanor?

Was the value of the property or services stolen not more than \$1000 and [the property was taken from (the person of another) (a corpse) (a grave) (a coffin containing a corpse)] [the property was (a record of a court or officer) (or) (a writing, instrument, or record kept, filed or deposited according to law with or in the keeping of any public officer or office) [the property was taken (from a burning, abandoned, or vacant building or taken when it was removed) (from an area of destruction caused by (civil disaster) (riot) (bombing) (or) (proximity (closeness) to a battle))]] [the property taken was public funds belonging to the state or to any political subdivision or agency][the property taken was a motor vehicle]?

Did the defendant's conduct create a reasonably foreseeable risk of bodily harm to another? "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition. It is not necessary that bodily harm resulted, if a reasonably foreseeable risk of such harm was created.

You must answer the question(s) "yes" or "no." If you have reasonable doubt as to your answer, then you should answer the question "no."

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#### COMMENT

In cases in which the value is found to be between \$200 and \$500, the jury may be asked to find that the defendant has or has not been convicted within the preceding five years of an offense under M.S.A. §§ 256.98; 268.18, subd. 3; 609.52; 609.24; 609.245; 609.53; 609.582, subd. 1, 2 or 3; 609.625; 609.63; or 609.821, or a statute of another State in conformity with any of those provisions, and has been sentenced to a felony or gross misdemeanor sentence, whether stayed or executed. If the defendant does not stipulate to such a prior conviction, the instruction should be modified accordingly. *See State v. Davidson*, 351 N.W.2d 8 (1984).

**CRIMJIG 16.83****AGGREGATION OF VALUES**

If you find the defendant guilty of one or more acts of theft within a period of six months, you have an additional issue to determine, and it will be put to you in the form of questions that will appear on the verdict form. The questions are these: Was the total value of the (property) (services) taken more than \$35,000?<sup>1</sup> Was the total value of the (property) (services) taken in all the acts more than \$2,500 but not more than \$35,000? Was the total value of the (property) (services) taken in all the acts more than \$500 but not more than \$2,500? Was the total value of the (property) (services) taken in all the acts more than \$200 but not more than \$500? Was the total value of the (property) (services) taken in all the acts not more than \$200? You will answer one of these questions "yes." If you have a reasonable doubt as to the value of the (\_\_\_\_\_), you should answer "yes" to the lesser of the values you believe it had.

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**16.83**

<sup>1</sup>This question should only be

used in cases charging a violation of M.S.A. § 609.52, subd. 2(3) and 2(4).



**CRIMJIG 16.84****POSSESSION OR SALE OF STOLEN OR  
COUNTERFEIT CHECK—DEFINED**

Under Minnesota law, whoever sells, possesses, receives, or transfers a check that is (stolen) (or) (counterfeit), knowing or having reason to know the check is (stolen) (or) (counterfeit), is guilty of a crime.

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**COMMENT**

M.S.A. § 609.528.

**CRIMJIG 16.85****POSSESSION OR SALE OF STOLEN OR  
COUNTERFEIT CHECK—ELEMENTS**

The elements of possessing or selling (stolen) (or) (counterfeit) checks are:

First, the check(s) (was) (were) (stolen) (or) (counterfeit).

Second, the defendant (sold) (possessed) (received) (or) (transferred) the check(s).

Third, the defendant knew or had reason to know the check(s) (was) (were) (stolen) (or) (counterfeit).

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant guilty, you have (an) additional issue(s) to determine, and (it) (they) will be put to you in the form of (a) question(s) on the verdict form. The question(s) (is) (are):

1. Did the offense involve a single direct victim? If so, did the total combined loss to the direct victim and any indirect victims total \$250 or less? More than \$250 but not more than \$500? A "direct victim" means any person or entity (from whom the check was stolen) (or) (whose name or other identifying information is contained in a counterfeit check). An "indirect victim" means any person or entity who suffers a loss or harm as a result of a crime who is not a direct victim.<sup>1</sup> "Loss" means the value<sup>2</sup> the defendant obtained

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16.85

<sup>1</sup>See M.S.A. § 611A.01 for definition of "crime" and "victim."

<sup>2</sup>See M.S.A. § 609.52, subd. 1(3), for a complete definition of "value."

and expenses incurred by a direct or indirect victim as a result of the crime.

2. Did the offense involve two or three direct victims?
3. Did the offense involve four or more direct victims?
4. Was the total combined loss to the direct and indirect victims more than \$500 but not more than \$2,500?
5. Was the total combined loss to the direct and indirect victims more than \$2,500?

If you have a reasonable doubt as to the number of direct victims or as to the value of the loss, you should answer "yes" to the lesser of the number or value you believe it had.



**CRIMJIG 16.86****MAIL THEFT—DEFINED**

**Under Minnesota law, whoever**

- [1] intentionally and without claim of right removes (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) from a mail depository**
- [2] intentionally and without claim of right takes (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) from a mail carrier**
- [3] intentionally and without claim of right removes the contents of (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article)) addressed to another**
- [4] intentionally and without claim or right (takes (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another)) (or) (the contents of (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) that has been left for collection on or near a mail depository**

**is guilty of mail theft.**

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**COMMENT**

**M.S.A. 609.529, subd 2(1), (2), (4), (5).**

**CRIMJIG 16.87****MAIL THEFT—ELEMENTS**

The elements of mail theft are:

[1] First, the defendant removed (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) from a mail depository. [A "mail depository" is a mail box, letter box, mail receptacle, post office or station of a post office, a mail route, or a postal service vehicle.]

[2] First, the defendant took (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) from a mail carrier.

[3] First, the defendant removed the contents of (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to an another).

[4] First, the defendant took (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another)) (or) (the contents of (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) which had been left for collection on or near a mail depository. [A "mail depository" is a mail box, letter box, mail receptacle, post office or station of a post office, a mail route, or a postal service vehicle.]

Second, the defendant acted with intent.

Third, the defendant acted without claim of right.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 16.88****MAIL THEFT—DECEIVING CARRIER—DEFINED**

Under Minnesota law, whoever obtains custody of (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article)) addressed to another by intentionally deceiving a (mail carrier) (or) (person who rightfully possesses or controls (the mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another), with a false representation, made with intent to deceive and which does deceive a (mail carrier) (or) (person who possesses or controls the (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) is guilty of mail theft.

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**COMMENT**

M.S.A. § 609.529, subd. 2(3).



**CRIMJIG 16.89****MAIL THEFT—DECEIVING CARRIER—ELEMENTS**

The elements of mail theft are:

First, the defendant obtained custody of (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article)) addressed to another.

Second, the defendant obtained custody from a (mail carrier) (or) (person who rightfully possesses or controls (the mail) (a (letter) (postal card) (package) (bag) (or) (sealed article)) addressed to another) with a false representation. [A false representation includes a promise made with intent not to perform or a representation of a past or present fact that the defendant knows is false.]

Third, the defendant made the false representation with intent to deceive.

Fourth, the (mail carrier) (or) (person who possessed or controlled (the mail) (a (letter) (postal card) (package) (bag) (or) (sealed article)) addressed to another) was deceived.

Fifth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 16.90****MAIL THEFT—RECEIVING, POSSESSING,  
TRANSFERRING, BUYING, OR CONCEALING—  
DEFINED**

Under Minnesota law, whoever receives, possesses, transfers, buys, or conceals (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) obtained by (defendant) (or) (another) (intentionally and without claim of right removing mail from a mail depository) (intentionally and without claim of right taking mail from a mail carrier) (intentionally deceiving a mail carrier or other person who rightfully possesses or controls the mail, with a false representation which is known to be false, made with intent to deceive and which does deceive a mail carrier or other person who possesses or controls the mail) (intentionally and without claim of right removing the contents of mail addressed to another) (intentionally and without claim of right took mail, or the contents of mail, that has been left for collection on or near a mail depository) knowing or having reason to know the (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) was obtained illegally is guilty of mail theft.

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**COMMENT**

M.S.A. § 609.529, subd. 2(6).

**CRIMJIG 16.91****MAIL THEFT—RECEIVING, POSSESSING,  
TRANSFERRING, BUYING, OR CONCEALING—  
ELEMENTS**

The elements of (receiving) (possessing) (transferring) (buying) (or) (concealing) illegally obtained mail are:

First, the defendant (received) (possessed) (transferred) (bought) (or) (concealed) (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another).

Second, the (mail) (letter) (postal card) (package) (bag) (or) (sealed article) was obtained by (defendant) (or) (another) (intentionally and without claim of right removing mail from a mail depository) (intentionally and without claim of right taking mail from a mail carrier) (intentionally deceiving a mail carrier or other person who rightfully possesses or controls the mail, with a false representation which is known to be false, made with intent to deceive and which does deceive a mail carrier or other person who possesses or controls the mail) (intentionally and without claim of right removing the contents of mail addressed to another) (intentionally and without claim of right took mail, or the contents of mail, that has been left for collection on or near a mail depository). [A false representation includes a promise made with intent not to perform or a representation of a past or present fact that the defendant knows is false.]

Third, the defendant knew or had reason to know the (mail) (a (letter) (postal card) (package) (bag) (or) (sealed article) addressed to another) was obtained illegally.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



**CRIMJIG 16.92**

**IDENTITY THEFT—DEFINED**

Under Minnesota law, whoever, with intent to commit or aid any unlawful activity, (transfers) (possesses) (uses) an identity that is not the person's own is guilty of identity theft.

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**COMMENT**

M.S.A. § 609.527.

**CRIMJIG 16.93****IDENTITY THEFT—ELEMENTS**

The elements of identity theft are:

First, the defendant (transferred) (possessed) (used) an identity that was not (his) (her) own. "Identity" means any name, number or data transmission that may be used, alone or together with any other information, to identify a specific individual. These include:

[1] a name, social security number, date of birth, official government-issued driver's license or identification number, government passport number, or employer or taxpayer identification number;

[2] unique electronic identification number, address, account number or routing code;

[3] telecommunication identification information or access device.

Second, the defendant did so with intent to (commit) (aid<sup>1</sup>) unlawful activity [Here insert the definition and elements of the unlawful activity<sup>2</sup>].

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable

**16.93**

<sup>1</sup>See the Comment to CRIMJIG 4.01 for a discussion of the term "aid." Generally, more than passive inaction is required in order for defendant to be guilty of aiding the commission of an offense.

<sup>2</sup>The State is required to prove that defendant committed or attempted to commit the predicate

felony. The court should be careful to instruct the jury on all essential elements of the underlying crime, each of which must be proved beyond a reasonable doubt. Failure to fully instruct the jury is plain error unless the defendant stipulates to the underlying crime or any element of it. *See State v. Charles*, 634 N.W.2d 425 (Minn. App. 2001).

doubt, the defendant is not guilty.



**CRIMJIG 16.94****IDENTITY THEFT BY FALSE PRETENSE—DEFINED**

Under Minnesota law, whoever, with intent to obtain the identity of another, uses a false pretense in an e-mail to another person or in a web page, electronic communication advertisement, or any other communication on the Internet, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.527, subd. 5a.

**CRIMJIG 16.95****IDENTITY THEFT BY FALSE PRETENSE—  
ELEMENTS**

The elements of identity theft by false pretense are:

First, the defendant used a false pretense in an e-mail to another person or in a web page, electronic communication advertisement, or any other communication on the Internet. ["False pretense" means any false, fictitious, misleading, or fraudulent information or pretense or pretext depicting or including or deceptively similar to the name, logo, Web site address, e-mail address, postal address, telephone number, or any other identifying information of a for-profit or not-for-profit business or organization or of a government agency, to which the user has no legitimate claim of right.]

Second the defendant used the false pretense with intent to obtain the identity of another.

Third, the defendant's act took place on (or about) \_\_\_\_ in \_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

## CRIMJIG 16.96

### POSSESSION OF THEFT TOOLS—DEFINED

Under Minnesota law, whoever has in possession any device, explosive, or other instrumentality with intent to use or permit the use of the same to commit theft is guilty of a crime.

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#### COMMENT

M.S.A. § 609.59.



CRIMJIG 16.97

POSSESSION OF THEFT TOOLS—ELEMENTS

The elements of the possession of theft tools are:

First, the defendant had in possession (\_\_\_\_\_) (an instrumentality designed for or suited to use in the commission of a theft). The statutes of Minnesota define the elements of theft as \_\_\_\_\_.<sup>1</sup> (To find the defendant possessed \_\_\_\_\_, it is not necessary that the defendant had it on the defendant's person, but the defendant must have exercised knowing dominion and control over it.)

Second, the defendant had the intent to use (or permit the use of) the (\_\_\_\_\_) (instrumentality) to commit theft. It is not necessary that the defendant had a particular theft in mind, so long as the defendant intended to use (or permit the use of) the (\_\_\_\_\_) (instrumentality) to commit the theft.

Third, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

COMMENT

M.S.A. § 609.59.

<sup>1</sup>16.97 Define and state the elements of theft under the appropriate CRIMJIG.

**CRIMJIG 16.98****RESIDENTIAL MORTGAGE FRAUD—DEFINED**

Under Minnesota law, whoever:

- [1] (conspires to) (or) knowingly makes or causes to made any deliberate and material misstatement, misrepresentation, or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process
- [2] (conspires to) (or) knowingly uses or facilitates the use of any deliberate and material misstatement, misrepresentation or omission, knowing it to contain a material misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the lending process

is guilty of a crime.

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**COMMENT**

M.S.A. § 609.822, subd. 2.

**CRIMJIG 16.99****RESIDENTIAL MORTGAGE FRAUD—ELEMENTS**

The elements of residential mortgage fraud are:

**Conspiracy to make or cause**

[1] First, the defendant conspired to make or cause to made a deliberate and material (misstatement) (misrepresentation) (or) (omission) during the mortgage lending process.

Second, the defendant knew it contained a material (misstatement) (misrepresentation) (or) (omission).

Third, the defendant did so with the intent that the material (misstatement) (misrepresentation) (or) (omission) relied upon by a mortgage lender, borrower, or any other party to the mortgage lending process.

[Insert CRIMJIG 5.06 and such other jury instructions on conspiracy as may be appropriate. See Chapter 5 for further instructions.]

**Knowingly make or cause**

[1] First, the defendant made or caused to made a deliberate and material (misstatement) misrepresentation, or omission during the mortgage lending process.

Second, the defendant knew it contained a material (misstatement) (misrepresentation) (or) (omission).

Third, the defendant did so with the intent that the material (misstatement) (misrepresentation) (or) (omission) relied upon by a mortgage lender, borrower, or any other party to the mortgage lending process.

**Conspiracy to use or facilitate the use**

[2] First, the defendant conspired to (use) (or) (facilitate the use of) a deliberate and material (misstatement)



(misrepresentation) (or) (omission) during the mortgage lending process.

Second, the defendant knew it contained a material (misstatement) (misrepresentation) (or) (omission).

Third, the defendant intended that it be relied on by a mortgage lender, borrower, or any other party to the lending process.

[Insert CRIMJIG 5.06 and such other jury instructions on conspiracy as may be appropriate. See Chapter 5 for further instructions.]

#### Use or facilitate the use

[2] First, the defendant (used) (or) (facilitated the use of) a deliberate and material (misstatement) (misrepresentation) (or) (omission) during the mortgage lending process.

Second, the defendant knew it contained a material (misstatement) (misrepresentation) (or) (omission).

Third, the defendant intended that it be relied on by a mortgage lender, borrower, or any other party to the lending process.

A (misstatement) (misrepresentation) (or) (omission) is material if it would have influenced another person's judgment or decision if that person had known about it.

The "mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan including, but not limited to, solicitation, application, or origination, negotiation of terms, third-party provider services, underwriting, signing and closing, and funding of the loan. Documents involved in the mortgage lending process include, but are not limited to, uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank

statements, tax returns, and payroll stubs; and any required disclosures.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

If you find the defendant is guilty, you have an additional issue to determine, and it will be put to you in the form of (a) question(s) that will appear on the verdict form. The question(s) (is) (are): Was the aggregate economic loss (of \_\_\_\_\_) more than \$35,000? Was the aggregate economic loss (of \_\_\_\_\_) more than \$5000, but not more than \$35,000? Was the aggregate economic loss (of \_\_\_\_\_) more than \$1000, but not more than \$5000? Was the aggregate economic loss (of \_\_\_\_\_) more than \$500, but not more than \$1000? Was the aggregate economic loss (of \_\_\_\_\_) not more than \$500? You will answer one of the questions "yes." If you have a reasonable doubt as to the value of the \_\_\_\_\_, you should answer "yes" to the lesser of the values you believe it had.

Did the defendant know or have reason to know that \_\_\_\_\_ (the victim) was vulnerable due to age, infirmity or reduced physical or mental capacity? You should answer the question "yes" or "no." If you have a reasonable doubt as to the answer, then you should answer the question "no."

\_\_\_\_\_

COMMENT

The definition of "material" is drawn from CIVJIG 57.10 and the cases cited in the Authorities of that jury instruction.

The aggregate economic loss questions are based upon M.S.A. § 609.52, subd. 3 mad applicable by the provisions of M.S.A. § 609.822, subd. 3. The vulnerable victim question is based upon the provisions of M.S.A. § 609.822, subd. 4.

**CRIMJIG 16.100****UNLAWFUL POSSESSION OF SCANNING DEVICE  
OR RE-ENCODER—DEFINED**

Under Minnesota law, whoever possesses, with the intent to commit, aid, or abet any unlawful activity, any device, apparatus, equipment, software, material, good, property, or supply that is designed or adapted for use as a scanning device or a re-encoder is guilty of a crime.

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**COMMENT**

M.S.A. 609.527, subd. 5b.



**CRIMJIG 16.101****UNLAWFUL POSSESSION OF SCANNING DEVICE  
OR RE-ENCODER—ELEMENTS**

The elements of unlawful possession of a scanning device or re-encoder are:

First, the defendant possessed (a device) (an apparatus) (equipment) (software) (material) (good) (property) (or) (supply) that was designed or adapted for use as a scanning device or a re-encoder. "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a computer chip or magnetic strip or stripe of a payment card, driver's license, or state-issued identification card. "Re-encoder" means an electronic device that places encoded information from the computer chip or magnetic strip or stripe of a payment card, driver's license, or state-issued identification card, onto the computer chip or magnetic strip or stripe of a different payment card, driver's license, or state-issued identification card, or any electronic medium that allows an authorized transaction to occur. Payment card" means a credit card, charge card, debit card, or any other card that: (1) is issued to an authorized card user; and (2) allows the user to obtain, purchase, or receive credit, money, a good, a service, or anything of value.

Second, the defendant possessed the (device) (apparatus) (equipment) (software) (material) (good) (property) (or) (supply) with the intent to commit, aid, or abet an unlawful activity.

Third, the defendant's act took place on (or about) \_\_\_\_\_  
in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

**CRIMJIG 16.102****UNLAWFUL USE OF SCANNING DEVICE OR  
RE-ENCODER—DEFINED**

Under Minnesota law, whoever uses a scanning device or re-encoder without permission of the cardholder of the card from which the information is being scanned or re-encoded, with the intent to commit, aid, or abet any unlawful activity, is guilty of a crime.

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**COMMENT**

M.S.A. § 609.527, subd. 5b.

**CRIMJIG 16.103****UNLAWFUL USE OF SCANNING DEVICE OR  
RE-ENCODER—ELEMENTS**

The elements of unlawful possession of a scanning device or re-encoder are:

First, the defendant used (a device) (an apparatus) (equipment) (software) (material) (good) (property) (or) (supply) that was designed or adapted for use as a scanning device or a re-encoder. "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a computer chip or magnetic strip or stripe of a payment card, driver's license, or state-issued identification card. "Re-encoder" means an electronic device that places encoded information from the computer chip or magnetic strip or stripe of a payment card, driver's license, or state-issued identification card, onto the computer chip or magnetic strip or stripe of a different payment card, driver's license, or state-issued identification card, or any electronic medium that allows an authorized transaction to occur. Payment card" means a credit card, charge card, debit card, or any other card that: (1) is issued to an authorized card user; and (2) allows the user to obtain, purchase, or receive credit, money, a good, a service, or anything of value.

Second, the defendant used the (device) (apparatus) (equipment) (software) (material) (good) (property) (or) (supply) without permission of the cardholder of the card from which the information is being scanned or re-encoded.

Third, the defendant used the (device) (apparatus) (equipment) (software) (material) (good) (property) (or) (supply) with the intent to commit, aid, or abet an unlawful activity.

Fourth, the defendant's act took place on (or about) \_\_\_\_\_ in \_\_\_\_\_ County.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find



that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.



















